1 In the Court of Claims.

JOHN R. GLEASON AND GEORGE W. GOSNELL, plaintiffs,
vs.
THE UNITED STATES, DEFENDANTS. } No. 17782.

I.—*Petition.—Filed October 25, 1892.*

To the honorable the judges of the Court of Claims:

The petition of John R. Gleason and George W. Gosnell, partners, doing business under the firm name of Gleason & Gosnell, residents of Louisville, in the State of Kentucky, and citizens of the United States, respectfully represents:

I. That a contract under seal was made by plaintiffs as parties of the second part with Lieutenant-Colonel William E. Merrill, Corps of Engineers, United States Army, acting for and in behalf of the United States, party of the first part, and signed and delivered by the parties thereto August 4, 1885, and approved by the Chief of Engineers of the United States Army August 14, 1885, copy of which is hereto attached, marked "Exhibit A," and prayed to be taken as a part of this petition.

II. That by this contract the plaintiffs contracted with the United States to perform certain public work for the defendant, namely:

2 One hundred and ten thousand (110,000) cubic yards of rock excavation, to be performed by the plaintiffs in the enlargement of the Louisville and Portland Canal at Louisville, Kentucky, such excavation being a portion of the area included between the guiding dike, the cross dam as it was at that time, and the cross dam as it was to be when the proposed improvements were completed. For this work the plaintiffs were to receive eighty-five cents (85 cents) per cubic yard, and all material excavated was to be the property of the plaintiffs.

III. That on January 21, 1887, a supplemental contract was entered into between Major Amos Stickney, acting for and in behalf of the United States as a party of the first part, and the plaintiffs as parties of the second part, by which supplemental contract the time for completing the said work was extended till December 31, 1887, and by which plaintiffs undertook certain conditions of work. A copy of this contract is hereto attached, marked "Exhibit B," and is prayed to be taken as a part of this petition.

IV. That on the account of scarcity of labor, and excessive heat of the summer season of 1887, and for other good and sufficient reasons, the plaintiffs requested, in the latter part of the year 1887, and requested in writing on December 31, 1887, that the time for completing the contract be extended to December 31, 1888, and, at the dictation of the said Major Amos Stickney, proposed certain conditions as to work. This request was granted January 9, 1888, by the said Major Amos Stickney. Copies of said request and reply are hereto attached, marked, respectively, "Exhibit C" and "Exhibit D," and made a part hereof.

V. That by this allowance of additional time and extension of

3 the contract the rights and obligations of the parties thereto subsisted, took effect, and were enforcible precisely as if the new

date for the completion of the contract had been the date originally therein agreed upon.

VI. That the said contract contains the following provisions:

"If the party (or parties) of the second part shall, by freshets, ice, or other force or violence of the elements, and by no fault o' his or their own, be prevented from either commencing or completing the work or delivering the materials at the time agreed upon in this contract, such additional time may, in writing, be allowed him or them for such commencement or completion as in the judgment of the party of the first part, or his successor, shall be just and reasonable; but such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforcible precisely as if the new date for such commencement or completion had been the date originally herein agreed upon."

The advertisements and specifications of the United States inviting bids for the contract, and which, by the terms of the contract, are a part thereof, also contained a promise to the same effect, namely:

"9. The general form of contracts made under authority of the War Department provides that additional time may be allowed to a contractor for beginning or completing his work in cases of delay from 'freshets, ice, or other force or violence of the elements, and by no fault of his or their own.'"

VII. That the Louisville and Portland Canal begins on the Kentucky side of the Ohio River, at the head of the falls, and where the current is extremely swift. The fall is about 13½ feet in the mile, consequently a slight rise adds enormously to the force of the current.

4 The excavation to be done on the work was in the natural bed of the river, where it was formerly exposed only in extremely low water, when the canal on the south side and the narrow channel, or "Indian chute," on the extreme north side were able to accommodate the entire volume of the Ohio. Shortly after the war the United States Government constructed a timber dam extending across the middle portion of the river bed, in order to force the river to flow through the canal and Indian chute.

This dam was five feet high—that is to say, it excluded five feet of water—and was designed, and was effectual, to keep the rock bed where the work was to be done exposed at all normal stages of the river, and its existence permitted drilling, blasting, and excavating to be done in the river bed, and enabled the contract to be undertaken by the plaintiffs, and the plaintiffs aver that the specifications of the United States upon which they made their bid and which form a part of the contract particularly located with reference to said dam the work to be done, and they undertook the contract, relying upon the existence and efficient character of the said Government dam.

VIII. That immediately after the letting of the contract to the plaintiffs, in August, 1885, they began active preparations for the work, building an incline, including engine and hoisting apparatus, and railroad, and procuring carts and drills and other implements and materials, in and for which preparations, implements, and materials they expended large sums of money.

At that time the height of the river prevented the beginning of active work on the excavation.

In or about September, 1885, the said Colonel Wm. E. Merrill, the United States engineer, acting as the officer and agent of the defendant, ordered the plaintiffs to construct a timber dam extending from
5 the extreme southern and western point of their work parallel with the canal to the water gate, and thence north across the river to the cement quarry dam of Speed & Co., which it joined. This dam the plaintiffs built under the direction of said Merrill, the United States engineer in charge of the work. It was of such height as to keep out five feet of water, which the said engineer said was high enough, but this dam was afterwards raised about a foot by plaintiffs.

IX. That usually there is steady low water in the Ohio River at this point during the greater part of the summer and through the fall, during which time such work as that for which plaintiffs contracted could be carried on without interruption. But the year 1888 was a decided exception to this rule. During that year, for which the contract was extended and renewed, as aforesaid, the freshets in the river and the force and violence of the elements were such that the work was repeatedly flooded, damaging and delaying plaintiffs in their excavations, and for long periods of time completely putting a stop to their operations. From January 1, 1888, the state of the river was such for months that work was impossible. Preparations were made in good faith by the plaintiffs for carrying out all of the conditions of work under which the contract was renewed or extended, and large sums of money were spent by them for this purpose, to wit, the sum of $7,025.60. They made contracts for the supplies needed and built the additional incline and railways; also bought the additional cars and four additional steam drills, making the ten required. It was, however, impossible to use the second incline or railway tracks and other appliances on account of the state of the river, which would have swept everything away. Some time before work was possible, on account of the water, they had the inclines, railways, hoisting engines, extra cars, and additional drills required ready, but the height of
6 the river prevented the use of the additional incline, and the old incline was more than sufficient to carry all the rock which could possibly be gotten out in the flooded condition of the working space and conditions of work imposed by the said Stickney, as hereinafter more fully set forth.

Until after the middle of June the stage of the river was not only extremely uncertain, but the river bed about the work and between it and the incline by which the excavated material was conveyed away was covered from one-half foot to three feet deep with rushing water, and it was entirely impracticable for the plaintiffs to do their work and build other railway tracks from it to the inclines.

X. That in the summer of 1888, and shortly before the time when it became practicable by the subsiding of the river to begin operations upon the work, the said Major Amos Stickney, the engineer in charge, acting as agent of the United States, required and ordered that the plaintiffs should make a cut into the rock east (upstream) of the timber dam which they had built as aforesaid. This necessitated the removal of the central part of the timber dam. In order to protect the work thus left exposed from the water they were obliged to build an earthen dam, which extended crosswise of the river above the said cut and at its ends joined the timber dam. This earthen dam was begun June 17, and was sufficient to

keep out five feet of water. By June 30 the earthen dam had been so far completed and the river had so subsided that the plaintiffs were able to begin pumping water out of the working space. To do this they had a large steam pump at work, and by July 9 they were able to get their railway tracks to partially conform to the change of plan of the work and to commence drilling. In blasting, breaking up, and carrying off
7 the rock they were at this time working 192 men, and machinery (drills) equivalent to 175 men—a total of 367 men. In this estimate a steam drill equals 25 men. They also had other drills, representing 75 men, and cars and new inclines and steam hoisters ready for use, but could not use them because of the submerged condition of the work and want of room. Said working force, men, drills, cars, &c., was as large as could be efficiently used upon said work, and was sufficient to excavate 640 yards of rock per day, and move 640 cars, allowing a yard of rock to a car.

The plaintiffs aver and charge that the direction and order by the United States engineer to remove their timber dam and build the said dirt dam and make the said cut were unwise, unskillful, and improper, and resulted in great delay and damage to the plaintiffs, the said damage amounting to $2,000.

XI. That prior to this, plaintiffs had several times requested the said Major Amos Stickney, the United States engineer, to have large and increasing leaks in the Government dam repaired, which leaks let a large quantity of water into plaintiffs' works and greatly damaged them, but he refused to make any repairs on the said Government dam.

The plaintiffs aver and charge that it was the duty of the said engineer to keep the said dam in repair, and that his refusal was wrongful and unjust, and that the plaintiffs were greatly damaged and delayed by the leakage from the said Government dam, the loss and expense arising from which formed no proper part of the expense of the work which plaintiffs contracted to perform, and that such damage to plaintiffs amounted to $4,925, and arose from a cause within the control of the United States.

XII. That on July 11, 1888, the river rose to six feet eight
8 inches, broke over the plaintiffs' dam, and flooded their works. It kept rising daily—to seven feet ten inches, nine feet six inches, ten feet nine inches, eleven feet two inches, eleven feet four inches, and still rising.

From that time until July 30th the water never got below six feet. On that day it was five feet ten inches, and they began rebuilding the dam where it was broken, with fifty-three men and eight double teams. Three days later, August 2d, the water having subsided to five feet one inch, they began pumping the water out of their works.

XIII. That meantime they were also engaged in two other kinds of work, under the said United States engineer's directions. Upon the part of the rock that was exposed they set a number of their drills to work drilling holes (about 500 in all, representing the labor of 25 men for 25 days), so that they might be ready for rapid blasting as soon as the water subsided further.

They had also been directed and ordered by the said Major Amos Stickney, the United States engineer, to raise the Government dam so

that they would keep out eight feet of water. They followed such direction of the said engineer, and busily engaged in this work, and raised the dam and water gate over a foot by adding heavy timbers.

The plaintiffs aver and charge that this work of adding to the Government dam and gate was a matter of direct benefit and advantage to the United States, but was not included directly or indirectly in the plaintiffs' contract, and the expense thereof formed no proper part of the cost which the plaintiffs incurred, or were to incur, for the work which they contracted to perform, and the expense and loss to the plaintiffs, by reason of so adding to the Government dam and canal gate, by direction of the United States engineer, amounted to the sum of $788.

9 XIV. That on the 22d day of August, 1888, another sudden and violent freshet in the river swept away the entire Government dam at one place, and overflowed the plaintiffs' earthen dam and their works. The river stood five feet three inches on the 21st; on the 22d it was seven feet ten; on the 23d, eight feet eleven; the 24th, nine feet two; the 25th, ten feet; the 26th, eleven feet two, and still rising. During the time prior to this freshet there were 13 days during which the contractors could work in blasting, and at the time of the overflow they were working 192 men and seven steam drills, representing 175, or a total of 367 men, who were crowded in the working space, and a greater force could not be worked by the contractors effectually. Besides, other machinery, representing many men, was being operated in carrying off the blasted rock, as the contract required.

XV. That after each freshet it took time to get the maximum force to work. The water and swift current, if it did not destroy, disarranged the railway tracks. These had to be repaired and changed to suit the new plan of working imposed by the said Stickney as aforesaid; and it required some eight or nine days to pump out the water, and the damage was much increased by the large leaks aforesaid from the Government canal wall and dam.

XVI. That after the freshet of August 22d the river remained exceptionally high until October 5th, when it stood 4 feet 6 inches, and the plaintiffs again began rebuilding their dam, and on the 7th began again to pump out the water from their works. This was nearly completed, when on or about the 15th day of October, 1888, the dam and all the works were again overflowed by a freshet, the water rising rapidly to over 11 feet and submerging their three boilers, cars, etc., the violence of the freshet being such that one of the boilers was overturned.

10 From that time it was impossible to do anything upon the work. The exceptional height of the river, as well as the sudden rise, was such that it was impossible for plaintiffs to complete the work by the 31st day of December, 1888.

XVII. That completion of their work by plaintiffs within the time limited by the extended or renewed contract was unavoidably delayed and was a physical impossibility, and such impossibility was directly due to the freshets and force and violence of the elements and damage resulting therefrom, and to no want of faithfulness, or diligence, or skill, or from any voluntary departure from the specifications or requirements of the contract on the part of the plaintiffs, and the plaintiffs were entitled to a reasonable extension of time for completing the contract.

XVIII. That in blasting and handling their rock up to the year 1888 the plaintiffs did not use the highest grade of dynamite, and employed a large number of derricks for lifting large pieces of rock loosened by the blasts. In the last year of the contract the said Major Amos Stickney, the engineer, acting as the agent of the United States, directed and ordered them to discontinue the use of their derricks and to use a very high grade of dynamite, with the expectation that it would break the rock into pieces small enough to be handled without derricks. The result of this was that the high grade or strong dynamite did not break the rocks in the manner expected; and, as the derricks had been taken away, the plaintiffs were compelled to redrill and split the large loosened rocks in order that their men might handle them. Furthermore, the strong dynamite blew fragments of the rock to great distances and over the canal and upon several houses in the city of Louisville, including the glass-covered depot of the Chesapeake, Ohio and
11 Southwestern Railway Co. and the factory of the Kentucky Lead and Oil Co., amongst others. This led to local difficulties, extending from July to October, with the owners of these buildings, which considerably hampered the plaintiffs' work and resulted finally in an injunction order, issued by the Louisville chancery court on October 11, 1888, and executed on the plaintiffs on October 11 and October 16, 1888, forbidding the plaintiffs to do any more blasting at all. This injunction continued in force during the year 1888 and to the end of the time limited by the renewed contract.

And the plaintiffs aver and charge that such order and direction of the United States engineer to use said stronger grade of dynamite was unwise, unskillful, improper, and wrong, and resulted in much delay and in great expense and damage to the plaintiffs, amounting to the sum of $6,405, which sum forms no part of the proper or legitimate expense incurred, or to be incurred, by the plaintiffs in the performance of the work for which they contracted.

XIX. That as the work progressed there was found on it in a low part of the surface 1,000 yards, more or less, of gravel, sand, and earth, which was not known to either of the parties when the contract was made. The United States engineer refused to pay 85 cents per yard for the excavation of this material, but agreed that it should be included in his estimate of excavation at a total valuation of $500, and said gravel, sand, and earth was excavated by the plaintiffs, but was not included in the said engineer's estimate as promised, and the said $500 is still due to the plaintiffs from the United States.

XX. That Oscar Shanks, the assistant to the said Major Amos
12 Stickney, in one or more instances gave directions to the plaintiffs to excavate to a certain bottom grade, which plaintiffs did and finished as directed, and thereafter changed his mind and altered his directions and ordered plaintiffs to excavate to a lower grade, which altered directions plaintiffs obeyed, and thereby plaintiffs were put to great delay and expense in unnecessarily changing their railroad tracks and being compelled to employ carts in place of cars, such unnecessary changes costing the plaintiffs the labor of 6 men for 16 days at $1.25 per day, amounting to $120, besides unnecessarily delaying the plaintiffs in the completion of the contract, and the said $120 is due to the plaintiffs from the United States.

XXI. That since the last measurement and estimate by the United States engineer, in the latter part of the year 1887, the plaintiffs have performed a large amount of labor and excavation and have expended large sums of money, their running expenses since that date amounting to over the sum of $9,600, including an average monthly pay roll of $615, all of which labor and money was expended on the work to be performed under the contract.

That in the latter part of the year 1887 the plaintiffs excavated, in lowering the grade as last above stated, 1,000 yards of solid rock, for which they were entitled to 85 cents per yard under the contract, amounting to $850, but that no estimate of said 1,000 yards of excavation was ever made by the said Major Amos Stickney or his assistant, and the United States is now indebted to the plaintiffs for the said excavation in the sum of $850.

XXII. That in December, 1887, the plaintiffs excavated from the face of the work, in addition to that taken from the bottom as above stated, 1,000 yards of solid rock, for which they were entitled to
13 contract price of 85 cents per yard, amounting in all to $850, but for which they received no estimate, measurement, or payment, as required by the contract, and for this excavation the United States is now indebted to the plaintiffs in the sum of $850.

And the plaintiffs aver and charge that the United States engineer erred in making his measurements and estimates of the excavation performed by the plaintiffs under the contract, and that the plaintiffs performed a greater amount of excavation than was shown by the estimates of the said United States engineer prior to the 13th day of December, 1887. And the failure of the United States engineer to furnish correct estimates of the excavation performed, and his failure to make estimates and payments for the excavation performed by the plaintiffs in December, 1887, and in the year 1888, were breaches of the contract and caused great damage to the plaintiffs.

XXIII. That of the high grade or strong dynamite which the plaintiffs purchased for use, as ordered by the said Major Amos Stickney, the United States engineer, and which proved unsuitable and dangerous as aforesaid, the plaintiffs had left on hand 5,400 pounds which was of no use to them, and which they were obliged to dispose of promptly on account of its deterioration if kept on hand, and this dynamite the plaintiffs were obliged to sell at a loss; whereby the plaintiffs were damaged in the sum of $540. And the plaintiffs aver and charge that this damage resulted from the unskillfulness, misdirection, error, and fault of the said Major Amos Stickney, and from a cause within the control of the United States and not by any fault of the plaintiffs.

XXIV. That during the year 1888 the plaintiffs excavated 2,530 yards of solid rock, for which they received no measurement, or
14 estimate, or payment from the United States agent, and for which they were and are entitled to receive 85 cents per yard, the contract price, amounting to the sum of $2,150.50.

XXV. That on or about December, 1888, the said Major Amos Stickney refused to plaintiffs the extension of time which they requested, and to which they were rightfully entitled under the contract, by reason of being prevented from completing the same within the time limited by the last extension and renewal thereof, by freshets and by the force and

violence of the elements and by no fault of their own, and by reason of damages and hindrances from causes within the control of the United States; and the plaintiffs were thereby prevented from completing the work.

And the plaintiffs aver and charge that the said refusal of the said Stickney to extend the time for the completion of the contract was wrongful and unjust, and a breach of the contract.

XXVI. That when the plaintiffs were compelled to cease excavation in October, 1888, there was of solid rock blasted out, but not yet removed, a large quantity, which excavation, in that partly completed condition, was of a value of $550, which last-mentioned sum is due to the plaintiffs from the United States.

XXVII. That during the latter part of the year 1888 the plaintiffs drilled in the rock to be excavated under the contract a large number of holes of a value of $800, which holes were finished and ready for blasting, but which the plaintiffs were prevented from using by the refusal of the said Major Amos Stickney, the United States engineer, to grant the extension of time to which the plaintiffs were entitled as aforesaid, whereby the plaintiffs were damaged in the sum of $800.

15 XXVIII. That when the plaintiffs were thus compelled to cease operations they had completed upon the work the excavation of 39,965 cubic yards of rock, leaving in work or yet to be excavated 70,035 cubic yards. The latter would have produced 105,052 cubic yards of broken rock of a market value of 70 cents per cubic yard and a total value of $73,536.40, and would have been the property of the plaintiffs under the contract.

The contract price for the 70,035 yards of the remaining work, at 85 cents per yard, to be received by the plaintiffs from the United States, was $59,529.75. The cost to the plaintiffs of making this excavation would have been 70 cents per yard, a total cost of $49,024.50.

By the breach or breaches aforesaid of the contract the plaintiffs were deprived of large profits, to wit, of $10,505.25, the excess of the contract price over the cost of working, and of $73,536.40, the value of the excavated stone, a total profit of $84,041.65, and are damaged in the latter sum, which the plaintiffs are entitled to have and recover from the United States.

XXIX. That when the plaintiffs ceased work, as aforesaid, there was earned by them and due them from the United States the sum of $3,011.39, the same being a part of the contract price for work performed by the plaintiffs under the contract and estimated and accepted by the United States engineer or agent, and retained from plaintiffs, and the plaintiffs aver that said sum has been since the 31st day of December, 1888, and is now, rightfully due to and wrongfully withheld from them by the defendant.

XXX. That since the 13th of December, 1887, the plaintiffs have received no estimate or payment from the United States, or from any agent or officer of the United States, on account of this contract,

16 or for any work thereunder, notwithstanding the large amount of excavation performed by the plaintiffs in December, 1887, and in 1888.

And the plaintiffs aver and charge that such failures on the part of the said Major Amos Stickney to make the proper monthly estimates and

payments were breaches of the contract and of great damage to the plaintiffs.

XXXI. Wherefore the plaintiffs claim that they are justly entitled to have and to receive from the defendant the following sums of money:

For delay, loss, expense, and damage by reason of the removal of a portion of the timber dam and the building of the earthen dam at the direction and order of the United States engineer	$2,000.00
For delay, loss, expense, and damage by reason of the leakage from the United States Government dam into the works of the plaintiffs	4,925.00
For delay, loss, expense, and damage by reason of adding to the Government dam and canal wall by the direction and order of the United States engineer	788.00
For delay, loss, expense, and damage by reason of use of improper kind of dynamite ordered by the United States engineer to be employed	6,405.00
For excavating earth and loose rock on the work directed by Government officers to be excavated, at a less rate than 85 cents	500.00
For unnecessary changing of railroad tracks, and employment of carts instead of cars	120.00
For excavation performed on bottom of quarry during December, 1887	850.00
For excavation performed during December, 1887, on face of quarry	850.00
Damage by reason of loss on sale of dynamite ordered to be used by the United States engineer and found to be improper and useless for the purpose	540.00
17 For excavation performed during August, 1888	2,150.50
For loose rock blasted out but not removed in August, 1888	550.00
For drilling holes not used in July and August, 1888	800.00
Retained percentage on work performed and allowed	3,011.99
Profits which the plaintiffs would have made on 70,035 yards of solid rock still in work, including value of rock	84,041.65
Total	$107,532.14

XXXII. And the petitioners further represent that they, the plaintiffs, are the sole owners of the claim herein set forth and the only persons interested therein; that there has been no assignment or transfer thereof, or of any part thereof or interest therein, made; and that the plaintiffs are citizens of the United States and have always borne true allegiance thereto, and believe that the facts stated in this petition are true.

All of the above sums of money, amounting to one hundred and seven thousand five hundred and thirty-two dollars and fourteen cents ($107,532.14) the plaintiffs believe and claim to be justly due, and that they are entitled to have and recover the same from the defendant after allowing all just credits and set-offs.

Wherefore the plaintiffs pray judgment against the defendant for one hundred and seven thousand five hundred and thirty-two dollars and fourteen cents ($107,532.14).

H. N. Low,
Attorney for Plaintiffs.
Simrall & Bodley,
Of Counsel.

Petitioners' address is Louisville, Kentucky, and the address of their attorney is Room 164 Washington Loan and Trust Company, Ninth and F streets, Washington, D. C.

18 J. R. Gleason and George W. Gosnell say they are petitioners in the foregoing petition, and that the statements therein are true, as they believe.

J. R. Gleason.
George W. Gosnell.

STATE OF KENTUCKY, *County of Jefferson, ss:*

Before me, a notary public in and for the county and State above written, on this sixth day of June, 1892, personally appeared John R. Gleason and George W. Gosnell, the above-named petitioners, who, being duly sworn according to law, did depose and say that the facts set forth in the above petition are just and true as stated.

Witness my hand and seal as notary public aforesaid.

[SEAL.] TEMPLE BODLEY,
Notary Public.

EXHIBIT A.—Temple Bodley, notary public.

(Form 19 a.)

Articles of agreement entered into this fourth day of August, eighteen hundred and eighty-five (1885), between Lieutenant-Colonel William E. Merrill, Corps of Engineers, U. S. Army, of the first part, and J. R. Gleason and G. W. Gosnell, partners, doing business under the firm name of Gleason & Gosnell, of Louisville, of the county of Jefferson, State of Kentucky, of the second part:

This agreement witnesseth that, in conformity with the advertisement and specifications hereunto attached, and which form a part of this contract, the said Lieut. Col. Wm. E. Merrill, for and in behalf of the United States of America, and the said Gleason & Gosnell, for themselves, their heirs, executors, and administrators, have mutually agreed, and by these presents do mutually covenant and agree, to and with each other, as follows:

19 That the said Gleason & Gosnell shall make one hundred and ten thousand (110,000) cubic yards, more or less, of rock excavation in the enlargement of the Louisville and Portland Canal. That the said Lieut.-Col. Wm. E. Merrill shall pay for said rock excavation at the rate of eighty-five cents ($0.85) per cubic yard.

All materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the Government, and such as do not conform to the specifications set forth in this contract shall be rejected. The decision of the engineer officer in charge as to quality and quantity shall be final.

The said Gleason & Gosnell shall commence work under this contract on or before the twentieth day of August, eighteen hundred and eighty-five (1885), and shall complete the same on or before the thirty-first day of December, eighteen hundred and eighty-six (1886).

If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then in either case the party of the first part, or his successor legally appointed, shall have power, with the sanction of the chief of engineers, to annul this contract by giving notice in writing to that effect to the party or parties (or either of them) of the second part, and upon the giving of such notice all money or reserved percentage due or to become

due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States; and the party of the first part shall be thereupon authorized, if an immediate performance of the work or delivery of the materials be in his opinion required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in section 3709 of the Revised Statutes of the United States (provided, however, that if the party or parties) of the second part shall, by freshets, ice, or other force or violence of the elements, and by no fault of his or their own, be prevented either from commencing or completing the work or delivering the materials at the time agreed upon in this contract, such additional time may in writing be allowed him or them for such commencement or completion as, in the judgment of the party of the first part or his successor, shall be just and reasonable; but such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforcible precisely as if the new date for such commencement or completion had been the date originally herein agreed upon.

If, at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the project and this change or modification should involve such change in the specifications as to character and quantity, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War: Provided, That no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred.

No claim whatever shall at any time be made upon the United States by the party or parties of the second part for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished, under or by virtue of this contract and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the party of the first part or his successors, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the chief of engineers.

The party of the second part shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material.

Payments shall be made to the said Gleason & Gosnell when the work contracted for shall have been delivered and accepted, reserving 10 per cent from each payment until the whole work shall have been so delivered and accepted.

SPECIFICATIONS.

GENERAL DESCRIPTION.

1. It is proposed with the funds available ($120,000) to excavate to canal grade a portion of the area included between the guiding dyke, the present cross dam, and the cross dam as it will be when the proposed improvements are completed.

DISPOSITION OF EXCAVATED MATERIAL.

2. All material excavated under this contract will be the property of the contractor, and must be disposed of in such a manner as not to interfere with navigation, of which the engineer in charge shall be the judge. The contractor is forbidden to deposit any excavated material on canal property without permission.

3. All trees, snags, logs, and other loose articles on the space to be excavated must be removed without extra charge.

22 4. After any portion of the excavation is brought down to grade and accepted by the inspector the contractor will not be required to remove any deposits that may subsequently be carried into this area by currents or floods.

METHOD OF WORKING.

5. The excavation must be carried down to the established grade as shown on the maps on file in the canal office, which maps are hereby made a part of these specifications.

6. In blasting rock, the contractor will be expected to carry the excavation down to grade before moving his men elsewhere. The force working on the top ledge must not be more than 50 feet in advance of that which is employed in bottoming.

GENERAL REQUIREMENTS.

7. The contractor must begin work within 20 days after notification that his bid has been accepted, unless hindered by high water; and, within thirty days thereafter, his working force must consist of at least 200 men, if working by hand, or the equivalent thereof in case excavating machines are used. If, at any time, the working force be reduced to 150 men or less, the engineer in charge shall have the right to terminate the contract; and in such case the retained percentage shall be forfeited to the United States.

8. The contract will expire on the 31st day of December, 1886; but the right is reserved to annul the contract in January, 1886, in case forty per cent of the work covered by the same shall not have been completed on or before the 31st day of December, 1885. The annulment of the contract under the provisions of this paragraph will, however, involve no forfeiture of moneys previously earned.

9. The general form of contracts made under authority of the

23 War Department provides that additional time may be allowed to a contractor for beginning, or completing, his work in cases of delay from "freshets, ice, or other force or violence of the elements, and by no fault of his or their own."

10. The United States will not be responsible for any damages caused by floods, ice, or other causes not under their control.

CHANGES IN CONTRACT AND EXTRA WORK.

11. The following paragraphs form a part of all War Department contracts, and the attention of contractors and inspectors is specially called to them:

If at any time during the prosecution of the work it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quantity, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War: Provided, That no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred.

No claim whatever shall at any time be made upon the United States by the party or parties of the second part for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the party of the first part or his successor, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers.

MEASUREMENT AND INSPECTION.

12. An inspector will be appointed, who will give all lines and levels, make all measurements, and will have general oversight of the work.

13. All measurements will be of material in place, and payment will be made accordingly. No payment will be made for excavation below the grades shown on the maps, which form part of these specifications.

14. It must be distinctly understood that it is not the duty of the inspector to act as engineer for the contractor, nor is he expected to boss the contractor's employés. When requested to do so he may give advice, but the contractor will be under no obligation to follow this advice, and the United States will not be responsible for any loss or damage that may result from following it. The duty of the inspector is limited to seeing that the work is performed in the manner prescribed by the specifications; and he will not interfere with the contractor unless the latter departs from the specifications, or adopts a method of working which, in the judgment of the inspector, will fail to secure the desired result, or will unnecessarily increase the total cost of the work.

PAYMENTS.

15. Payments will be made on monthly estimates, but ten per cent of the amount due will be retained until the completion of the contract.

INSTRUCTIONS TO BIDDERS.

1. All proposals must be on the accompanying form and must be in duplicate. Each proposal must also be accompanied by a guarantee signed by two responsible persons, each of whom shall justify in
25 the sum of ten thousand dollars ($10,000), that the bidder will, within ten days after being notified of the acceptance of his bid, enter into a contract in accordance with the terms and conditions of the advertisement, and will give bond, with good and sufficient sureties, for the faithful and proper fulfillment of the same.

2. When a firm is bidder the member of the firm who signs the firm name of the proposal should state in addition the names of all the individuals composing the firm.

3. All prices must be written in words as well as in figures.

4. All signatures must have affixed to them seals of wax or wafer.

5. The contract which the bidders and guarantors promise to enter into shall be, in its general provisions, in the form adopted and in use by the Engineer Department of the Army, blank forms of which will be furnished to parties proposing to put in bids. Bidders are to be understood as accepting the terms and conditions contained in such form of contract.

6. Reasonable grounds for supposing that any bidder is interested in more than one bid will cause the rejection of all the bids in which he is interested.

7. The United States reserves the right to reject any or all bids; also to disregard the bid of any failing bidder or contractor known as such to the Engineer Department.

8. The bidder must satisfy the United States of his ability to do the work for which he bids.

9. Transfers of contracts or of interests in contracts are prohibited by law.

10. The duplicate proposals should be placed in an envelope, which should be sealed and indorsed "Proposals for Rock Excavation at the Falls of the Ohio River;" and no responsibility shall attach for a premature opening of any proposal not so indorsed. If sent by mail,
26 the sealed proposals should be placed inside a second envelope, directed to Lieut. Col. Wm. E. Merrill, Corps of Engineers, Custom-House, Cincinnati, O.

11. A copy of this advertisement and specifications will be attached to the contract and will form a part thereof.

12. No bidder will be informed, directly or indirectly, of the name of any person intending to bid or not to bid, or to whom information in respect to proposals may have been given.

13. Proposals must be prepared without assistance from any person belonging to or employed in the military service of the United States.

14. In accordance with law, all Government contracts must contain an express condition that no Member of Congress or Delegate shall be admitted to any share or part of such contract, or the benefit arising therefrom.

15. Bidders are invited to be present at the opening of the bids.

16. No bid will be entertained which is not made on the printed forms, and bidders are cautioned to see that the forms are properly filled out and signed in duplicate.

Neither this contract nor any interest therein shall be transferred by the said Gleason & Gosnell to any other party; and any such transfer shall cause the annulment of the contract, so far as the United States are concerned. All rights of action, however, to recover for any breach of this contract by the said Gleason & Gosnell are reserved to the United States.

No Member of or Delegate to Congress, nor any person belonging to or employed in the military service of the United States, is or shall be admitted to any part or share of this contract, or to any benefit which may arise therefrom.

This contract shall be subject to approval of the Chief of Engineers, U. S. A.

27 In witness whereof the undersigned have hereunto placed their hands and seals the date first hereinbefore written.

WM. E. MERRILL, [SEAL.]
Lt. Col. Engr.
J. R. GLEASON. [SEAL.]
G. W. GOSNELL. [SEAL.]

Witnesses as to signatures of Gleason & Gosnell:

SAM'L B. CRAIL.
HENRY F. CASSIN.

As to Lt. Col. Wm. E. Merrill:

HENRY L. SMITH.

(Executed in quintuplicate.)
Approved August 14th, 1885.

JOHN NEWTON,
Chief of Engineers, Brig. and Bvt. Maj. Gen.

EXHIBIT B.—Temple Bodley, notary public.

(Form 19a.)

Supplemental articles of agreement entered into this 21st day of January, eighteen hundred and eighty-seven (1887), between Maj. Amos Stickney, Corps of Engineers, U. S. Army, of the first part, and John R. Gleason and George W. Gosnell, partners, doing business under the firm name of Gleason & Gosnell, of Louisville, of the county of Jefferson, State of Kentucky, of the second part.

This agreement witnesseth that the said Maj. Amos Stickney, for and in behalf of the United States of America, and the said Gleason & Gosnell, for themselves, their heirs, executors, and administrators, have mutually agreed, and by these presents do mutually covenant and agree, to and with each other as follows:

28 That the time for completing the contract signed by the said Gleason & Gosnell, August 4th (fourth), eighteen hundred and eighty-five (1885), for rock excavation in the enlargement of the Louisville and Portland Canal, be extended to December thirty-first (31st), eighteen hundred and eighty-seven (1887), upon the following conditions, viz: First, That the said Gleason & Gosnell shall so arrange their excavation on the line common to sections 2 (two) and 3 (three) as not to interfere with

the Government work of Contractor Mulloy, or the work of the contractor for the new wall of the said Louisville and Portland Canal. Second, That should the said Gleason & Gosnell fail to employ a sufficient force, not less than three hundred (300) men, or its equivalent in machinery, to finish their work in the required time, the officer in charge shall be authorized to perform any of the work in his discretion, and deduct the cost from any money due or to become due the said Gleason & Gosnell.

This supplemental contract shall be subject to approval of the Chief of Engineers, U. S. A.

In witness whereof the undersigned have hereunto placed their hands and seals the date first hereinbefore written.

AMOS STICKNEY, [SEAL.]
Maj. of Eng'rs, U. S. A.
JOHN R. GLEASON. [SEAL.]
GEORGE W. GOSNELL. [SEAL.]
GLEASON & GOSNELL. [SEAL.]

Witnesses:

B. H. COOPER.
J. B. QUIN.
F. E. MACKENZIE.
F. E. McKENZIE.

(Executed in quintuplicate.)

29 EXHIBIT C.—Temple Bodley, notary public.

LOUISVILLE, KY., *December 31st, 1887.*

MAJOR AMOS STICKNEY,
Corps of Engineers, U. S. A.

DEAR SIR: We respectfully ask an extension of time on our contract for enlarging the Louisville and Portland Canal at the head of the falls of the Ohio River until the 31st of December, 1888, for the following reasons, to wit:

There was so much work being done upon railroads during the last year throughout the State that labor was very hard to get.

We used every effort to secure the required amount of labor on our contracts, but found it impossible to do so.

We even employed agents in New York and other cities to procure and ship labor to us here and then found it very difficult to hold the labor we obtained, although we paid more than contractors paid for labor on railroads. Besides, the summer season was excessively hot, so very hot that for sixty to ninety days in many instances the men would work only two or three hours a day.

We propose to provide not less than ninety cars of the same capacity as those now used and a sufficient number of carts and teams in addition, if necessary, to move not less than 640 cubic yards (measured in place) of excavated rock per day of ten hours.

We propose to build an additional incline for depositing excavated material, the minimum actual working capacity of both inclines to be not less than 640 cars per day of ten hours.

We propose to provide, maintain, and operate not less than ten steam drills on the work, and to provide and operate a sufficient force of men to excavate and handle at least 640 cubic yards of rock (measured in place) per day of ten hours.

The method of carrying on the work will be such as will be approved by the officer in charge.

30 When practicable during the summer season we propose to provide and operate an adequate force at night.

All additional plants will be obtained and available for use by the time rock excavation can be commenced, and we propose to bear all extra cost to the United States occasioned by the extension of time for completing our contract.

Very respectfully,
(Signed) GLEASON & GOSNELL.

EXHIBIT D.—Temple Bodley, notary public.

U. S. ENGINEER OFFICE,
NO. 507 WEST CHESTNUT STREET,
Louisville, Ky., Jan. 9th, 1888.

Messrs. GLEASON and GOSNELL,
Louisville, Ky.

SIRS: You are hereby notified that the time for completion of your contract for excavation in enlargement of the head of the Louisville and Portland Canal is extended to December 31st, 1888, on condition that the provisions in your letter of December 31st, 1887, a copy of which is enclosed, shall be faithfully carried out. Any failure to carry out these provisions will terminate your contract.

Very respectfully,
(Signed) AMOS STICKNEY,
Major of Engineers, U. S. A.

(1 enclosure.)

31 JOHN R. GLEASON AND GEORGE W. Gosnell, plaintiffs, *vs.* THE UNITED STATES, DEFENDANTS. } No. 17783.

II—*Petition—Filed October 25, 1892.*

To the honorable the chief justice and the judges of the Court of Claims:

The petition of John R. Gleason and George W. Gosnell, partners, doing business under the firm name of Gleason & Gosnell, residents of Louisville, in the State of Kentucky, and citizens of the United States, respectfully represents:

I. That a contract, under seal, was made by plaintiffs, as parties of the second part, with Maj. Amos Stickney, Corps of Engineers, U. S. Army, acting for and in behalf of the United States, as party of the first part, and signed and delivered by the parties thereto January 13, 1887, and approved by the Chief of Engineers of the United States Army,

copy of which is hereto attached, marked "Exhibit 1," and prayed to be taken as a part of this petition.

II. That by this contract the plaintiffs contracted with the United
32 States to perform certain public work for the defendant, namely, one hundred and twenty-four thousand (124,000) cubic yards of earth excavation and thirteen thousand (13,000) cubic yards of solid-rock excavation, to be performed by the plaintiffs in the enlargement of the basin of the Louisville and Portland Canal at the head of the locks. For this work the plaintiffs were to receive seventeen and one-half cents ($17\frac{1}{2}$) per cubic yard for earth excavation and for solid-rock excavation one dollar and five cents ($1.05) per cubic yard.

III. That the time for completing the work under this contract was extended to December 1, 1888, by the said Maj. Amos Stickney, by letters dated January 7, 1888, and September 7, 1888, copies of which letters are hereto attached, marked respectively "Exhibit 2" and "Exhibit 3," and are prayed to be taken as a part of this petition.

IV. That the said contract contains the following provision:

"If the party (or parties) of the second part shall, by freshets, ice, or other force or violence of the elements, and by no fault of his or their own, be prevented from either commencing or completing the work or delivering the materials at the time agreed upon in this contract, such additional time may, in writing, be allowed him or them for such commencement or completion as, in the judgment of the party of the first part or his successor, shall be just and reasonable; but such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforcible precisely as if the new date for such commencement or completion had been the date originally herein agreed upon."

The advertisements and specifications of the United States inviting bids for the contract, and which, by the terms of the contract, are a part thereof, also contained a promise to the same effect, namely:

33 "9. The general form of contracts made under authority of the War Department provides that additional time may be allowed to a contractor for beginning or completing his work in case of delay from 'freshets, ice, or other force or violence of the elements and by no fault of his or their own.'"

V. That the work consisted of the excavation of over 124,000 cubic yards of earth and over 13,000 cubic yards of underlying solid rock, in a space lying parallel with the axis of the new locks, at the head of the latter on the north side of the canal wall.

The material was to be dumped principally in the space just north of the excavation. Prior to the commencement of the work the space to be excavated was covered with earth rising higher than the wall of the canal.

For the completion of this work certain extensions were granted, as aforesaid, on account of the flooded condition of the work and the consequent difficulties encountered by the plaintiffs in performing it. The last extension was from September 7 until December 1, 1888.

That by this allowance of additional time and extension of the contract the rights and obligations of the parties thereto subsisted, took effect, and were enforcible precisely as if the new date for the completion of the contract had been the date originally therein agreed upon.

VI. That during the last extension and renewal of the contract, namely, between the seventh day of September and the first day of December, 1888, the plaintiffs were, by freshets and the force and violence of the elements, and by no fault of their own, prevented from completing the work at the time agreed upon in the contract. Between said dates unusual and violent freshets in the Ohio River flooded and damaged
34 their works and unavoidably delayed the work of excavation, and prevented its completion within the time limited, namely, on or before the 1st day of December, 1888.

And the plaintiffs aver that for this cause they were entitled to the allowance of additional time for the completion of said work, as provided in said specifications and contract.

VII. That the specifications forming part of the contract further contained the following provisions:

"3. The work will consist of the excavation and removal of all material to canal grade, and finishing and sloping the berms, banks, etc., as shall be directed by the engineer in charge.

"4. The present retaining wall and a narrow embankment of earth behind it, properly sloped to prevent caving and washing, will be left standing."

VIII. That the specifications on which the plaintiffs bid particularly located the work to be done and the excavation to be made with reference to the United States canal wall, and provided for a sufficient retaining embankment along said wall.

And the plaintiffs aver that they were enabled to undertake the work because of and they relied upon the said canal wall and a sufficient embankment along the same.

And they further aver and charge that under said contract the United States undertook the maintenance of the said canal wall and the leaving of a sufficient embankment therefor, and that they, the plaintiffs, were bound to obey the directions and orders of the United States engineer in charge in all things relating to the leaving, constructing, and finishing said wall and embankment.

IX. That plaintiffs, as they were bound to do, made the exca-
35 vation up to the line and place directed by the said Major Amos Stickney, United States engineer in charge, through his assistant, leaving the said retaining wall, with such embankment of earth of such width and so sloped, as the said engineer directed.

X. That the embankment which was thus left by the said engineer was not of sufficient width or strength to prevent caving and washing. The water from the canal broke through the said wall, washed the embankment away, and flooded the plaintiffs' works, and this happened without any fault of the plaintiffs, but by reason of the character of the Government wall and the fault of the said United States engineer in directing it to be so nearly uncovered that it could not retain the water.

The plaintiffs, notwithstanding, used every means in their power to repair the damage. They put a heavy steam pump to work to pump this water out; they pointed the canal wall with cement; they built a large embankment against it of bags of earth, putting in five hundred bags of this, besides loose earth; they used tarpaulins and barrels, sawdust in the canal, and straw manure on the other side of the canal wall.

As fast as they would stop it in one place it would break through in another. They, therefore, built a five-foot dam across their works, so as to exclude the western half, where the excavation had been carried down to below the rock level from the eastern half, where there was much earth to excavate. Their railway tracks being submerged and the working space difficult of access, they had to carry off this earth partly by carts, of which they had as many as practicable—about ten double teams.

And the plaintiffs aver and charge that the orders and directions of and by the said United States engineer given to them, the plaintiffs, under and in pursuance of the above-quoted clauses 3 and 4 of
36 the specifications, forming a part of the contract, as aforesaid, in relation to the making of the excavation, the leaving of the embankment, and the finishing and sloping the berms, banks, etc., were unwise, unskillful, improper, and incompetent, and resulted in a great amount of pumping, banking, and labor which was not at all incidental to the work, but wholly unnecessary, and would not have been encountered, except for the errors and unskillfulness of the said United States engineer, and thereby caused great damage to the plaintiffs, amounting to the sum of $3,750, as well as great delay of the work, and that this delay and damage arose from no fault of the plaintiffs, and resulted from causes within the control of the United States.

XI. That a further cause of damage and delay to the plaintiffs was the lack of dumping facilities, and compulsory and unnecessary changes of their railroad tracks, resulting from the acts of the agent of the United States.

Dumping in the space north of the excavation having been stopped, the plaintiffs were required to dump about 10,000 cubic yards on the far side of the old locks. Upon the high embankment, or fill, made by them, they had in place, and part of the time in operation, three steam hoisters, with railway tracks extending from them down into the space to be excavated, on one side; and on the other, along the top of the high embankment, to the place for dumping. When this high embankment was filled up to the satisfaction of the engineer, the contractors were required to extend their tracks along a narrow way westwardly from the main embankment, and dumping could only be done on one side—that is, on the north side. The contractors being limited to this confined dumping space, were unable to carry on their earth excavation faster than they did.

37 There was no good or sufficient reason why the plaintiffs should not have been permitted to extend their tracks and dumping westwardly or northwestwardly, and there was in such direction a large space to be filled, and the United States engineer has, since the year 1888, extended the dump northwestwardly, but the plaintiffs were forbidden to so arrange their tracks or dispose of their excavated material.

The dumping space was so limited that it was impracticable to dump more earth than one steam hoister would bring from the excavation; and, in part, for that reason, only one of the three was used during most of the time.

There was continual, unnecessary, and improper changing of railway tracks, under the direction of said Major Amos Stickney, the United States engineer in charge of the work, through his assistant, which also materially hindered progress.

And the plaintiffs aver and charge that the orders and directions of the said United States engineer in charge of the work, in respect to dumping the material excavated, and in respect to frequently changing the location of the plaintiffs' railway tracks, were unwise, unskillful, unnecessary, and wrong, and resulted unavoidably in depriving the plaintiffs of proper and reasonable dumping facilities, and in great delay of the work and damage to the plaintiffs, the said damages amounting to the sum of $3,150.

XII. That in or about the month of October, 1888, the said Major Amos Stickney, through his assistant, ordered that a roadway made by plaintiffs, as they had been directed, should be changed, agreeing that the plaintiffs should be reimbursed for the labor thereby entailed upon them. That the plaintiffs made such change as ordered by the said Stickney at a cost of $150.00.

38 XIII. That on the latter portion of the excavation performed and completed by the plaintiffs in accordance with the contract they received from the United States engineer no estimate or payment; that the work so performed and for which the stipulated payment is still due from the United States to the plaintiffs consisted of 21,475 yards of earth, at seventeen and one-half cents (17½) per yard, and 500 yards of solid rock, at one dollar and five one-hundredths ($1.05) per yard, and the amount due for the same is $4,283.12.

And the plaintiffs aver and charge that the United States engineer erred in his estimates and measurements of the excavation performed by the plaintiffs. And the failure of the United States engineer to furnish correct estimates of the excavation performed, and his failure to make an estimate and payment for the excavation last performed by the plaintiffs as aforesaid, were breaches of the contract and caused great damage to the plaintiffs.

XIV. That on or about December, 1888, the said Major Amos Stickney refused to plaintiffs the extension of time which they requested, and to which they were rightfully entitled under the contract by reason of being prevented from completing the same within the time limited by the last extension and renewal thereof by freshets and by the force and violence of the elements, and by no fault of their own, and by reason of damages and hindrances from causes within the control of the United States, and the plaintiffs were by such refusal prevented from finishing the work.

And the plaintiffs aver and charge that the said refusal of the said Stickney to extend the time for the completion of the contract was wrongful and unjust and a breach of the contract, and that the contract was not annulled in the manner or for the reasons provided in the contract for an annulment thereof.

39 XV. That the plaintiffs at the time when they were prevented from completing the work as aforesaid had drilled in the solid rock to be excavated under the contract 130 holes for blasting of a value of $52, which holes they were prevented from utilizing, first, by reason of the leakage of water through the canal wall, and subsequently by reason of the refusal of the said Major Amos Stickney to allow the further time for the completion of the work to which the plaintiffs were entitled as aforesaid.

XVI. That the space included by the work and the contract therefor as ultimately fixed did, as a matter of fact, contain 132,000 cubic yards of earth and 17,000 cubic yards of solid rock. Of this amount the plaintiffs had at the time when they were obliged to cease work, as above stated, completed the excavation of 125,060 cubic yards of earth and 3,998½ cubic yards of rock, leaving still to be excavated 6,940 cubic yards of earth and 13,001½ cubic yards of rock.

The contract price for the remaining earth excavation at 17½ cents per yard would have been $1,214.50, and for the remaining solid rock excavation at $1.05 per yard would have been $13,651.58. The cost to the plaintiffs of making such excavations would have been $3,250.37 for the rock, and $1,214.50 for the earth.

And the plaintiffs aver that by the breach or breaches aforesaid of the contract on the part of the agent of the United States the plaintiffs were deprived of large profits, to wit, of $10,401.21, the excess of the contract price over the cost of working.

XVII. That when the plaintiffs were prevented from completing the work as aforesaid there was earned by them and due them from the United States the sum of $2,394.26, the same being a part of the contract price for work performed by the plaintiffs under the contract and
40 estimated and accepted by the United States engineer or agent, and retained from plaintiffs, and the plaintiffs aver that said sum has been, since the 1st day of December, 1888, and is now, rightfully due to and wrongfully withheld from them by the defendant.

XVIII. Wherefore the plaintiffs claim that they are entitled to have and to receive from the defendant the following sums of money:

For delay, loss, expense, and damage to earth excavation, from the flooding of said excavation through the United States canal wall by reason of fault and improper orders and directions of the United States engineer in charge in respect of leaving, sloping, and finishing the embankment by the United States canal wall	$3,750.00
For delay, loss, expense, and damage by reason of fault and improper orders and directions of the United States engineer in charge as to dumping the excavated material, and as to changes in the plaintiffs' railway tracks, whereby plaintiffs were hindered, put to unnecessary expense, and deprived of proper and reasonable dumping facilities and room	3,150.00
For loss, expense, and damage for teams and labor	150.00
For excavation done and completed in accordance with the contract, for which plaintiffs received no estimate from the United States engineer or compensation	4,283.12
For drilling holes which the plaintiffs were prevented from using	52.00
Retained percentage on work performed and allowed	2,394.26
Profits which the plaintiffs would have made on 13,001½ cubic yards of solid rock excavation remaining in work	10,401.21
Total	$24,180.59

41 XIX. And the petitioners further represent that they, the plaintiffs, are the sole owners of the claim herein set forth, and the only persons interested therein; that there has been no assignment or transfer thereof, or of any part thereof or interest therein, made; and that the plaintiffs are citizens of the United States, and have always borne true allegiance thereto, and believe that the facts stated in this petition are true.

All of the above sums of money, amounting to twenty-four thousand one hundred and eighty dollars and fifty-nine cents ($24,180.59), the

plaintiffs believe and claim to be justly due, and that they are entitled to have and recover the same from the defendant, after allowing all just credits and set-offs.

Wherefore the plaintiffs pray judgment against the defendant for twenty-four thousand one hundred and eighty dollars and fifty-nine cents ($24,180.59).

H. N. Low,
Attorney for Plaintiffs.
Simrall & Bodley,
Of Counsel.

Petitioners' address is Louisville, Kentucky, and the address of their attorney is Room 164, Washington Loan and Trust Company Building, Ninth and F streets, Washington, D. C.

J. R. Gleason and George W. Gosnell say they are petitioners in the foregoing petition, and that the statements therein are true as they believe.

J. R. Gleason,
Geo. W. Gosnell.

County of Jefferson, *State of Kentucky:*

Subscribed and sworn to before me this 6th day of June, 1892, by J. R. Gleason and George W. Gosnell.

Witness my hand and seal as notary public in and for the county and State aforesaid.

Temple Bodley,
Notary Public, Jefferson County, Kentucky.

42 State of Kentucky, *County of* , *ss:*

Before me, a notary public in and for the county and State above written, on this 6th day of June, 1892, personally appeared John R. Gleason and George W. Gosnell, the above-named petitioners, who, being duly sworn according to law, did depose and say that the facts set forth in the above petition are just and true as stated.

Witness my hand and seal as notary public aforesaid.

[seal.] Temple Bodley,
Notary Public.

Exhibit 1.—Temple Bodley, notary public.

(Form 19 a.)

Articles of agreement entered into this 13th day of January, eighteen hundred and eighty-seven (1887), between Maj. Amos Stickney, Corps of Engineers, U. S. Army, of the first part, and John R. Gleason and George W. Gosnell, partners, doing business under the firm name of Gleason & Gosnell, of Louisville, of the county of Jefferson, State of Kentucky, of the second part.

This agreement witnesseth, that in conformity with the advertisement and specifications hereunto attached, and which form a part of this contract, the said Amos Stickney, for and in behalf of the United States of America, and the said Gleason & Gosnell, for themselves, their heirs, exec-

utors, and administrators, have mutually agreed, and by these presents do mutually covenant and agree, to and with each other as follows:

That the said Gleason & Gosnell shall perform the following work, viz: One hundred and twenty-four thousand (124,000) cubic yards, more or less, of earth excavation, and thirteen thousand (13,000) cubic yards, more or less, of solid rock excavation, for enlarging the basin of the Louisville and Portland Canal at the head of the locks.

43 That the said Maj. Amos Stickney shall pay the said Gleason & Gosnell for the said excavation as follows:

For earth excavation, seventeen and one-half cents (17½) per cubic yard *yard*.

For solid rock excavation, one dollar and five cents ($1.05) per cubic yard.

Measurements to be made in place.

All materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the Government, and such as does not conform to the specifications set forth in this contract shall be rejected. The decision of the engineer officer in charge as to quality and quantity shall be final.

The said Gleason & Gosnell shall commence said excavation on or before the first (1st) day of February, eighteen hundred and eighty-seven (1887), and shall complete the whole work on or before the thirty-first (31st) day of December, eighteen hundred and eighty-seven (1887).

If in any event the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part, and, upon the giving of such notice, all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States; and the party of the first

44 part shall be thereupon authorized, if an immediate performance of the work or delivery of the materials be, in his opinion, required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in section 3709 of the Revised Statutes of the United States: Provided, however, that if the party (or parties) of the second part shall by freshets, ice, or other force or violence of the elements, and by no fault of his or their own, be prevented either from commencing or completing the work, or delivering the materials at the time agreed upon in this contract, such additional time may, in writing, be allowed him or them for such commencement or completion as, in the judgment of the party of the first part, or his successor, shall be just and reasonable; but such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforcible precisely as if the new date for such commencement or completion had been the date originally agreed upon.

If at any time during the prosecution of the work it be found advan-

tageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quantity, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reason for such change and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War: Provided, that no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred.

45 No claim whatever shall at any time be made upon the United States by the party or parties of the second part for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished, under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the party of the first part or his successor, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers.

The party of the second part shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material.

Payments shall be made to the said Gleason & Gosnell as provided for in said specifications, reserving ten (10) per cent from each payment until the whole work shall have been so delivered and accepted.

Neither this contract nor any interest therein shall be transferred by the said Gleason & Gosnell to any other party; and any such transfer shall cause the annulment of the contract so far as the United States are concerned. All rights of action, however, to recover from any breach of this contract by the said Gleason & Gosnell are reserved to the United States.

No Member of or Delegate to Congress, nor any person belonging to or employed in the military service of the United States is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom.

This contract shall be subject to approval of the Chief of Engineers, U. S. A.

46 In witness whereof the undersigned have hereunto placed their hands and seals the date first hereinbefore written.

AMOS STICKNEY, [SEAL.]
Maj. of Engineers.

JOHN R. GLEASON. [SEAL.]
GEORGE W. GOSNELL. [SEAL.]
GLEASON & GOSNELL. [SEAL.]

Witnesses:

B. H. COOPER.
ROBERT STEEL.
J. B. QUIN.
J. B. QUIN.

(Executed in quintuplicate.)

Louisville and Portland Canal.

SPECIFICATIONS FOR ENLARGING BASIN.

GENERAL DESCRIPTION.

1. It is proposed with the funds available, about $47,500 contingent expenses, to enlarge the basin at the head of the new locks on the north side of the present canal, as far as the available funds will permit.

2. The space to be excavated lies parallel with the axis of the new locks, and when completed will add 125 feet additional width to the present canal, from the locks to the present basin.

3. The work will consist of the excavation and removal of all material to canal grade, and finishing and sloping the berms, banks, etc., as shall be directed by the engineer in charge.

4. The present retaining wall and a narrow embankment of earth behind it, properly sloped to prevent caving and washing, will be left standing.

47 5. The buildings and fences at present standing on the site of the proposed work will he removed by and at the expense of the United States. The buildings are to be moved north of their present location as soon as the ground has been filled to the proper level by the contractor at their new sites. The filling under and around the proposed sites of these buildings will have to be made before they will be moved.

6. The present highway leading through the canal grounds is to be changed so as to pass between the present canal shops and the old locks. An embankment will have to be made for this highway, by the contractor, out of the material excavated, as specified in paragraph 16, and a temporary highway must be provided at some suitable place until the permanent site is prepared.

7. The contractor will be required to protect the property of the United States and will be held responsible for loss or damage to property caused by any of his agents or employees.

8. Where fences and enclosures exist, or should hereafter be made, they must be preserved, and should openings be required by the contractor they must be made at such places as directed by the engineer in charge, and suitable gates provided and kept closed by the contractor while not in actual use.

APPROXIMATE QUANTITIES.

9. Earth excavation, 124,000 cubic yards. Solid rock excavation, 13,000 cubic yards.

CLASSIFICATION.

10. Earth excavation will include clay, sand, gravel, loam, stones, and bowlders of all descriptions not exceeding one cubic yard in volume, all rock or slate that has heretofore been excavated, or any other material of an earthy nature not coming under the head of solid rock.

48 11. Solid rock excavation will include all rock that is regularly stratified and in position that can not be excavated except by blasting, or stones or bowlders that contain one cubic yard or more.

DISPOSITION OF MATERIAL.

12. All material excavated under this contract will be the property of the United States and must be used in filling canal grounds in the vicinity of the old and new locks, principally, however, the grounds between them, except as specified in paragraph 18.

13. All filling must be done evenly and regularly to such heights and with such slopes as shall be directed by the engineer in charge, who shall also designate the places and order of filling the same.

14. All trees, logs, hedges, or other material found on the ground to be excavated must be removed free of charge.

15. The filling around and under the proposed sites of the buildings that are to be moved, as mentioned in paragraph 5, must be carefully made in layers not to exceed one foot in thickness. The layers must be carefully spread, and all large lumps of earth broken up, and the whole well rammed and packed in place before the next layer is put on. This must be the first filling done.

16. An embankment or fill will be made from the excavated material for the proposed highway change, which shall be made before the other portions of the grounds are filled and immediately after the ground is prepared for the sites of the buildings, which must be of such heights and slopes as directed by the engineer in charge.

17. Some filling will also be required to and around the approaches to the bridge across the old locks.

18. In case the United States desires to reserve the rock excavated, or any part thereof, it must be piled in such manner and places as directed by the engineer in charge, or be used for filling, or dumped where needed for protection of banks, at such places as shall be directed by the engineer in charge.

49

METHOD OF WORKING.

19. The excavation must be carried down to the established canal grade, as shown on maps on file in canal office. The earth will be removed first.

20. In blasting rock the contractor will be expected to carry the excavation down to grade before moving his men elsewhere. The force working on the top ledge must not be more than 50 feet in advance of the bottoming at any time.

21. No excavation will be paid for below or outside the grades and lines given by the engineer in charge.

22. Whatever material may be deposited by high water upon the area to be excavated after the contract is made must be removed by the contractor free of cost to the United States.

23. It is to be understood that the contractor is to furnish all of the machinery and appliances necessary, and to perform all of the labor for the excavation and distribution of material. This includes whatever banking and pumping that may be necessary for excluding water and the protection of the work until completion. The Government is to furnish nothing, and be put to no expense whatever, except for the plans for an inspector and for the payment for excavation at the rates per yard agreed upon.

24. The contractor shall so conduct the work as not to interfere with navigation, in which he will be governed by the orders of the engineer in charge.

25. In case of any failure on the part of the contractor to perform the work with due diligence, the officer in charge shall be authorized to perform any of the work in his discretion and deduct the cost from any money due or to become due the contractor.

50 26. Bidders are expected to inspect the site of the work and to obtain all necessary information from this office before making proposals.

27. Bidders will state in their proposals the time when they will begin the work and the time when they will complete it; also the number of men they will employ.

28. Payments will be made on monthly estimates, reserving ten per cent from each payment until completion of contract.

LOUISVILLE, KY., *November 5th, 1886.*

GENERAL INSTRUCTIONS FOR BIDDERS.

1. All bills must be made in duplicate upon printed forms to be obtained at this office.

2. The guaranty attached to each bid must be signed by two responsible guarantors, to be certified to as good and sufficient guarantors by a United States district attorney, collector of customs, or any other officer under the United States Government, or responsible person known to this office.

3. When firms bid the individual names of the members should be written out, and should be signed in full, giving the Christian names; but the signers may, if they choose, describe themselves in addition as doing business under a given name and style as a firm.

4. All signatures must have affixed to them seals of wax or wafer.

5. The place of residence of every bidder, with county and State, must be given after his signature, which must be written in full.

6. All prices must be written as well as expressed in figures.

7. A percentage of ten (10) per centum will be retained from each payment until the completion of the contract, except where (as
51 in cases in which no payment is to be made until a work is completed) such percentage may, in the opinion of the officer in charge, properly be dispensed with.

8. The contract which the bidder and guarantors promise to enter into shall be, in its general provisions, in the form adopted and in use by the Engineer Department of the Army, blank forms of which can be inspected at this office, and will be furnished, if desired, to parties proposing to put in bids. Parties making bids are to be understood as accepting the terms and conditions contained in each form of contract.

9. Reasonable grounds for supposing that any bidder is interested in more than one bid for the same item will cause the rejection of all bids in which he is interested.

10. The United States reserves the right to reject any or all bids; also to disregard the bid of any failing bidder or contractor known as such to the Engineer Department.

11. The bidder must satisfy the United States of his ability to furnish the materials or perform the work for which he bids.

12. Transfers of contracts or of interests in contracts are prohibited by law.

13. In submitting proposals the sealed envelope must be so indorsed as to indicate before being opened the particular work for which the bid is made.

14. A guaranty will be required with the bid, and the guarantors must justify in the sum of ten thousand dollars.

15. Contract and bond must be filed within ten days after date of notification of award. The contractor's bond will be for ten thousand dollars.

52 EXHIBIT 2.—Temple Bodley, notary public.

U. S. ENGINEER OFFICE,
No. 507 WEST CHESTNUT ST.,
Louisville, Ky., January 7, 1888.

Messrs. GLEASON & GOSNELL,
Louisville, Ky.

SIRS: You are hereby notified that the time for completion of your contract for excavation in enlarging the basin of the Louisville and Portland Canal is extended to June 1, 1888, upon condition that you bear all extra expenses to the United States caused by the extension of time.

Very respectfully,
(Signed) AMOS STICKNEY,
Major of Engineers, U. S. A.

EXHIBIT 3.—Temple Bodley, notary public.

U. S. ENGINEER OFFICE,
No. 507 WEST CHESTNUT STREET,
Louisville, Ky., September 7, 1888.

Messrs. GLEASON & GOSNELL,
Louisville, Ky.

SIRS: The time for completing your contract, dated January 13, 1887, for enlarging basin of the Louisville and Portland Canal, at the head of the locks, is further extended to December 1, 1888, provided your work shall be so arranged as not to interfere with such other work as may be undertaken under the new appropriation, and that all extra cost to the United States by reason of the extension of time shall be charged against you and deducted from your payments.

Very respectfully,
(Signed) AMOS STICKNEY,
Major of Engineers, U. S. A.

53 III.—*Motion of claimants to consolidate and allowance of same.—Filed January 14, 1897.*

JOHN R. GLEASON AND GEORGE W. GOSNELL
vs.
THE UNITED STATES.
} Nos. 17782 and 17783.

Now come the claimants by their attorney, H. N. Low, and move the honorable court for the issuance of an order consolidating the above cases.

The grounds of the motion are that the parties are the same, the subjects-matter of the two cases are similar and related, that labor in briefing and arguing the cases when thus consolidated will be much lessened, and the cases can under such condition be more readily considered and disposed of by the court; a considerable part of the evidence relating to and having been filed in both cases.

JOHN R. GLEASON and
GEORGE W. GOSNELL,
By H. N. LOW, *Attorney.*

WASHINGTON, *January 11, 1897.*

I concur in the above.

GEORGE H. GORMAN,
Asst. Attorney for Defts.

Allowed.

C. C. NOTT,
Chief Justice.

54 IV.—*Traverse.—Filed May 25, 1897.*

In the Court of Claims of the United States, December Term, A. D. 1896.

JOHN R. GLEASON AND GEORGE W. GOSNELL
vs.
THE UNITED STATES.
} No. 17782 & 17783 (consolidated).

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimants herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

L. A. PRADT,
Assistant Attorney-General.

55 V.—*Findings of fact (as amended), and conclusions of law.—Filed December 6, 1897.*

These cases having been heard before the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT.

Upper work—Case No. 17782.

I.

On August 4, 1885, Lieut. Col. William E. Merrill, Corps of Engineers, United States Army, for and on behalf of the United States, party of the

first part, and John R. Gleason and George W. Gosnell, partners, of the second part, entered into the contract and specifications set out in full with and made a part of the petition herein, whereby the claimants agreed to commence work on or before August 20, 1885, and make "110,000 cubic yards, more or less, of rock excavation in the enlargement of the Louisville and Portland Canal," as therein provided for, at the rate of 85 cents per cubic yard, and to complete the same on or before December 31, 1886.

Said contract further, and among other things, provided that—

"If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then in either case the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party or parties (or either of them) of the second part, and upon the giving of such notice all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States; and the party of the first part shall be thereupon authorized, if an immediate performance of the work or delivery of the materials be, in his opinion, required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in section 3709 of the Revised Statutes of the United States (provided, however, that if the party or parties) of the second part shall, by freshets, ice, or other force or violence of the elements, and by no fault of his or their own, be prevented either from commencing or completing the work or delivering the materials at the time agreed upon in this contract, such additional time may in writing be allowed him or them for such commencement or completion as, in the judgment of the party of the first part or his successor, shall be just and reasonable; but such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforcible precisely as if the new date for such commencement or completion had been the date originally herein agreed upon."

56 II.

The season from August, 1885, to December 31, 1886, was favorable in the main for the character of work provided for by the contract, though the claimants were compelled by reason of high water and freshets to suspend their operations a number of times, and by reason of these difficulties, coupled with an insufficient force of men and other means necessary for the performance of the work, they only "completed 14 per cent of their entire work" during the contract period, 1½ per cent of which was done in 1885.

III.

In consequence of the claimants' inability to complete the work within the contract period, as aforesaid, they requested an extension of their

contract to December 31, 1887, which was granted on conditions stated in a supplemental contract, as follows:

ARTICLES OF AGREEMENT.

"Supplemental articles of agreement entered into this 21st day of January, eighteen hundred and eighty-seven (1887), between Major Amos Stickney, Corps of Engineers, U. S. Army, of the first part, and John R. Gleason and George W. Gosnell, partners, doing business under the firm name of Gleason & Gosnell, of Louisville, of the county of Jefferson, State of Kentucky, of the second part.

"This agreement witnesseth that the said Major Amos Stickney, for and in behalf of the United States of America, and the said Gleason & Gosnell, for themselves, their heirs, executors, and administrators, have mutually agreed, and by these presents do mutually covenant and agree, to and with each other, as follows:

"That the time for completing the contract signed by the said Gleason & Gosnell, August 4th (fourth), eighteen hundred and eighty-five (1885), for rock excavation in the enlargement of the Louisville and Portland Canal, be extended to December 31st (thirty-first), eighteen hundred and eighty-seven (1887), upon the following conditions, viz:

"First. That the said Gleason & Gosnell shall so arrange their excavation on the line common to sections 2 (two) and 3 (three) as not to interfere with the Government work of Contractor Molloy or the work of the contractor for the new wall of the said Louisville and Portland Canal.

"Second. That should the said Gleason & Gosnell fail to employ a sufficient force, not less than three hundred (300) men, or its equivalent in machinery, to finish their work in the required time, then the officer in charge shall be authorized to perform any of the work in his discretion, and deduct the cost from any money due or to become due the said Gleason & Gosnell."

The foregoing agreement was made subject to approval of the Chief of Engineers, United States Army, and was thereafter duly approved by the acting Secretary of War.

IV.

The claimants not having completed their contract during the year's extension thereof as aforesaid, they, on December 31, 1887, requested a second extension of said contract to December 31, 1888, for the reasons set forth in their communication of that date, which is as follows:

"LOUISVILLE, KY., *Dec. 31st, 1887.*

"Major AMOS STICKNEY,

"*Corps of Engineers, U. S. A.*

"DEAR SIR: We respectfully ask an extension of time on our contract for enlarging the Louisville and Portland Canal at the head of the Falls of the Ohio River until the 31st of December, 1888, for the following reasons, to wit:

"There was so much work being done upon railroads during the last year throughout the State that labor was very hard to get.

57 "We used every effort to secure the required amount of labor on our contracts, but found it impossible to do so. We even

employed agents in New York and other cities to procure and ship labor to us here, and then found it very difficult to hold the labor we obtained, although we paid more than contractors paid for labor on railroads. Besides, the summer season was excessively hot; so very hot, that for sixty to ninety days, in many instances, the men would work only two or three hours a day.

"We propose to provide not less than ninety cars of the same capacity as those now used, and a sufficient number of carts and teams in addition, if necessary, to move not less than 640 cubic yards (measured in place) of excavated rock per day of ten hours.

"We propose to build an additional incline for depositing excavated material, the minimum actual working capacity of both inclines to be not less than 640 cars per day of ten hours.

"We propose to provide, maintain, and operate not less than ten steam drills on the work and to provide and operate a sufficient force of men to excavate and handle at least 640 cubic yards of rock (measured in place) per day of ten hours.

"The method of carrying on the work will be such as will be approved by the officer in charge.

"When practicable, during the summer season, we propose to provide and operate an adequate force at night.

"All additional plant will be obtained and available for use by the time rock excavation can be commenced, and we propose to bear all extra cost to the United States occasioned by the extension of time for completing our contract.

"Very respectfully,

"GLEASON & GOSNELL."

Which letter was forwarded to the Chief of Engineers with the following communication:

"U. S. ENGINEER OFFICE,
"*Louisville, Ky., December 31st, 1887.*

"The CHIEF OF ENGINEERS, U. S. Army,
"*Washington, D. C.*

"GENERAL: I have the honor to forward herewith an application of Gleason & Gosnell for extension of time for completion of their contract on work of excavating for enlargement of the head of the Louisville and Portland Canal.

"The work of these contractors during the past season has been exceedingly unsatisfactory. Whilst they have had some difficulties to contend with in procuring labor, they have not conducted their work in a manner to produce the best results, and hardly seemed to comprehend the magnitude of their undertaking.

"After a number of consultations with the contractors and their principal bondsman, I have, however, concluded that the interests of the Government will be best served by an extension of time with the provisions which they have inserted in their application.

"These provisions call for nearly double the plant heretofore used and the adoption of method of work which will be approved by the engineer in charge; also the bearing of all extra expense to the United States occasioned by the extension of time. With these provisions, I believe

the engineer officer in charge will be able to push the work more rapidly than if it were relet to other contractors. I therefore recommend that the time for completing of their contract be extended as requested to December 31, 1888, on condition that the provisions in their application are faithfully carried out.

"Very respectfully, your ob'd't servant,

"AMOS STICKNEY,
"*Major of Engineers, U. S. A.*"

The extension of the time of said contract to December 31, 1888, as requested and recommended, was granted and approved by the Chief of Engineers "on condition that the provisions in their application are faithfully carried out," of which approval the claimants were notified by the following letter:

"U. S. ENGINEER OFFICE,
"*Louisville, Ky., January 9th, 1888.*

"Messrs. GLEASON & GOSNELL,
Louisville, Ky.

"SIRS: You are hereby notified that the time for completion of your contract for excavation in enlargement of the head of the Louis-
58 ville and Portland Canal is extended to December 31st, 1888, on condition that the provision in your letter of December 31, 1887, a copy of which is inclosed, shall be faithfully carried out. Any failure to carry out these provisions will terminate your contract.

Very respectfully,

"AMOS STICKNEY,
"*Major of Engineers, U. S. A.*"

V.

The rock to be excavated under the contract was in the river bed in an exposed situation, and was exposed to great force of the river when the latter rose to stages above the top of the Government cross dam, which cross dam was 5 feet high, measured by the canal gauge.

VI.

Before the contract aforesaid was entered into the engineer in charge prepared specifications for the information of bidders, which were exhibited to the claimants, and on the faith of which they entered into the contract. These specifications (7) contained the provision that the contractor "must begin work within twenty days after notification that his bid has been accepted, unless hindered by high water."

They were advised by the ninth specification so exhibited that their contract would provide "that additional time may be allowed to a contractor for beginning or completing his work in cases of delay from 'freshets, ice, or other force or violence of the elements, and by no fault of his or their own.'"

VII.

The condition of the Ohio River was during the season of 1888, the period of the last extension, unusual and unprecedented for repeated and

continued freshets and high water, overflowing the cross dam aforesaid; in consequence of which freshets and high water the working season of 1888, in the Ohio River at Louisville, Ky., was limited to about thirty-five days, mostly in July and August, as will more fully appear from the official monthly report of the defendants' officers of the progress of the work (known as section 3) from December, 1887, to December, 1888, as follows:

"DECEMBER, 1887.

"On section 3, Gleason & Gosnell, contractors, very little was done in December, except the removal of loose material which had been left above grade and in getting out machinery in anticipation of closing for the season. The water is several feet deep over both sections."

* * * * * * *

59 "MARCH, 1888.

"The stage of the river has prevented any work being done on the contracts of John Molloy, Gleason & Gosnell, and the Salem Stone and Lime Co."

* * * * * * *

"APRIL, 1888.

"No work has been done by the contractors on account of high water in the upper section."

* * * * * * *

"MAY, 1888.

"No excavation has been made by the contractors for the upper sections on account of high water."

* * * * * * *

"JUNE, 1888.

"On section 3, Gleason & Gosnell, contractors, a temporary earth dam has been constructed, the pumps started, and drilling on high points of rock begun. The first blasting was done June 30th."

* * * * * * *

"JULY, 1888.

"On section 3, Gleason & Gosnell, contractors, drilling on high points of rock was continued and a temporary dam of earth finished. The pit was pumped out and tracks surfaced. The contractors were run out by high water on the 11th instant and have not resumed."

* * * * * * *

"AUGUST, 1888.

"On section 3, Gleason & Gosnell, contractors, excavation was continued until the 18th of August, on which date the work was flooded by high water."

* * * * * * *

"SEPTEMBER, 1888.

"On section 3, Gleason & Gosnell, contractors, no work has been done since the contractors were run out by high water in August."

* * * * * * *

"OCTOBER, 1888.

"On section 3, Gleason & Gosnell, contractors, a temporary earth dam was begun on October 5th. The contractors' pump was started on October 9th and on the 11th the river washed away the dam, since which time no work has been done."

* * * * * * *

"NOVEMBER, 1888.

"On section 3, Gleason & Gosnell have done no work since October 11th. The river has been over their section since that date."

* * * * * * *

"DECEMBER, 1888.

"No work has been done by the contractors during the month. The contract of Gleason & Gosnell expired on December 31st."

* * * * * * *

VIII.

During the working season of 1888 the claimants were diligent in the prosecution of work embraced in the contract, in preparing therefor, and in endeavoring to exclude the water and freshets of the river.

They provided for the additional plant mentioned in their application for extension and had it ready for operation at the beginning of the season of 1888. But there was insufficient working time to complete the work by December 31, 1888, at the rate of 640 cubic yards for each practicable working day of twenty-four hours, and this from no fault of the claimants during the last extension of their said contract. No
60 act or omission of the claimants during the period of the last extension made it impossible to complete the work by December 31, 1888.

IX.

The force of the defendants' officer in charge of this same work after December 31, 1888, was, by reason of the overflow of the river, compelled to cease the work of excavation, to wit, in 1889 and 1890, at stages of water at from 6.1 to 6.10 feet, and they did not complete the work in three seasons subsequent to said 1888.

X.

After the working season of 1888 the claimants, through the personal solicitation of their attorneys, Bodley & Simrall, applied to the engineer in charge for an allowance of additional time for the completion of the work agreed upon in the contract so extended for the reason that they had been, by freshets and force and violence of the elements and by no fault of their own, prevented from completing the work at the time agreed upon in the contract, whereupon the engineer in charge refused to allow such additional time.

The defendants, nor the engineer officer in charge on their behalf, did not annul or terminate the contract as therein provided for by reason of

any delay or for any want of faithfulness or diligence on the part of the claimants in the prosecution of the work thereunder during the period of the last extension of said contract, but based his refusal to further extend the contract because, as he asserted, the claimants had for a number of seasons failed to complete the work within the times agreed upon.

No judgment or decision was given by said engineer on the question as to whether the (J. R.) claimants w're prevented by freshets and force and violence of the elements during the season of 1888 from completing the work agreed upon within the period limited by the last extension of the contract, nor did he find or decide that the claimants were not so prevented.

XI.

The amount of the reserved 10 per centum under said contract is $3,011.99, and has never been paid by the defendants to the claimants.

XII.

The total amount of rock in the area covered by the contract, as finally estimated by the defendants, was 118,935.22 cubic yards, of which the claimants had removed 35,435.22 cubic yards, leaving unremoved at the end of the season of 1888, 83,500 cubic yards.

XIII.

The cost to the claimants of performing this remaining work, 83,500 cubic yards, would have been $1.25 per cubic yard, and their total loss thereon at the contract price therefor would have been 40 cents per cubic yard, or $33,400.

XIV.

Under the specifications (2), made part of the contract and set out in the petition aforesaid, it is provided that "All material excavated under this contract will be the property of the contractor, and must be disposed of in such a manner as not to interfere with navigation, of which the engineer in charge shall be the judge. The contractor is forbidden to deposit any excavated material on canal property without permission."

61 Every yard of solid rock would have produced, by crushing, 1½ yards of broken stone, and upon this basis the remaining rock in the area covered by the contract at the end of the season of 1888 would have produced 125,250 cubic yards of broken stone.

XV.

The rock, when excavated and crushed, was a valuable commodity, for which there was a ready market in Louisville at $1.25 per cubic yard.

XVI.

The cost to the claimants of crushing and delivering the rock for the market aforesaid was 50 cents per cubic yard and the net value to the claimants of the crushed and delivered rock was 75 cents per cubic yard,

or $93,937.50, less the loss of $33,400, as set forth in Finding XIII, leaving $60,537.50 as the claimants' net profit under the contract for the remaining work.

XVII.

From the foregoing official reports, as well as from the other facts found herein, the court finds the ultimate fact that the condition of the river was as herein set forth; and the time remaining for active work, after deducting the time when it was impossible to do work by reason of the high water and freshets, was insufficient for the completion of the work under the contract within the period of extension, and that it was impossible for the claimants to complete the work within the working time thus remaining.

Lower work—Case No. 17783.

XVIII.

On January 13, 1887, Lieut. Col. William E. Merrill, Corps of Engineers, United States Army, for and on behalf of the United States, party of the first part, and John R. Gleason and George W. Gosnell, partners, of the second part, entered into the contract and specifications set out in full with and made part of the petition herein, whereby the claimants agreed to commence work thereunder on or before the 1st day of February, 1887, and to make 124,000 cubic yards, more or less, of earth excavation and 13,000 yards, more or less, of solid rock excavation "for enlarging the basin of the Louisville and Portland Canal at the head of the locks," as therein provided for, at and for the rate of 17½ cents per cubic yard for earth excavation and $1.05 per cubic yard for solid rock excavation, "measurements to be made in place," and to complete the same on or before December 31, 1887.

Said contract further and among other things provided:

"If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then in either case the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party or parties (or either of them) of the second part, and upon
62 the giving of such notice all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States; and the party of the first part shall be thereupon authorized, if an immediate performance of the work or delivery of the material be, in his opinion, required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in section 3709 of the Revised Statutes of the United States (provided, however, that if the party or parties), of the second part shall, by freshets, ice, or other force or violence of the elements, and by no fault of his or their own, be prevented either from commencing or completing the work or delivering the

materials at the time agreed upon in this contract, such additional time may, in writing, be allowed him or them for such commencement or completion as, in the judgment of the party of the first part or his successor, shall be just and reasonable; but such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforcible precisely as if the new date for such commencement or completion had been the date originally herein agreed upon."

XIX.

The season from February, 1887, to December 31, 1887, was favorable for the character of work specified in said contract, though the claimants failed to complete the same, and on December 28, 1887, they requested an extension of time until June 1, 1888, for the reasons set forth in their communication, as follows:

"LOUISVILLE, KY., *Dec. 28th, 1887.*

"Major AMOS STICKNEY,
"*Corps of Engineers, U. S. A.*

"DEAR SIR: We respectfully ask an extension of time on our contract for digging the basin at the locks in the Louisville and Portland Canal until the 1st of June, 1888, for the following reasons:

"There was so much work being done on railroads during the last year throughout the State that labor was exceedingly hard to obtain. We used every effort to secure the required amount of labor on our contract, but found it impossible to do so. We even employed agents in New York and other cities to procure and ship labor to us here, and then we found it very difficult to hold the labor we obtained, although we paid more than contractors paid for labor on railroads. Besides, the summer season was excessively hot—so very hot that for sixty or ninety days, in many instances, the men would work only two or three hours a day. We expect, however, to be able to finish the basin by the 1st of June, 1888.

"Very respectfully,

"GLEASON & GOSNELL."

Which letter was forwarded to the Chief of Engineers, with the following letter:

"U. S. ENGINEER OFFICE,
"*Louisville, Ky., December 31st, 1887.*

"The CHIEF OF ENGINEERS, U. S. ARMY,
"*Washington, D. C.*

"GENERAL: I have the honor to forward herewith an application of Gleason and Gosnell for an extension of time for completion of their contract for enlarging the basin of the Louisville and Portland Canal.

"This work is pretty well advanced, and nothing would be gained by a denial of this request. I therefore recommend that the time be extended to June 1st, 1888, upon condition that the contractors bear all extra expense to the United States caused by the extension of time, such expense to be deducted from their payments.

"Very respectfully, your obdt. servant,

"AMOS STICKNEY,
"*Major of Engineers, U. S. A.*"

The extension of time so requested and recommended to June 1, 1888, was granted and approved by the Chief of Engineers.

63 Not having completed their contract so extended, they, on May 29, 1888, requested a further extension to August 31, 1888, for the reasons set forth in their communication, as follows:

"LOUISVILLE, KY., *May 29th, 1888.*

"Major AMOS STICKNEY,

"*Corps of Engineers, U. S. A.*

"SIR: We respectfully ask further time, until August 31st, 1888, to complete our contract to widen the canal at the locks of the Louisville and Portland Canal, for the following reasons, viz:

"We were unable to do any work during the winter months, and lost the entire month of March, owing to continued rains, high water, and leakage through the canal wall, caused by the slope left behind the canal wall (which was the only protection we had to keep the water out) being composed largely of slate and rock instead of earth.

"Being somewhat cramped for dump room, frequent changes of track prevented us from working as big a force as desirable.

"Hoping these will be sufficient reasons for granting the additional time asked for, we are,

"Very respectfully,

"GLEASON & GOSNELL."

Which communication was forwarded to the Chief of Engineers by Major Stickney with the recommendation that the same be granted, saying, "It is believed the interests of the Government will be best served by granting the extension."

The request so made was granted and approved by the Chief of Engineers and the time extended accordingly.

The claimants, however, failed to complete their contract within the time so last extended, and August 29, 1888, they requested a further extension to December 31, 1888, for the reasons set forth in their letter, as follows:

"LOUISVILLE, KY., *August 29th, '88.*

"Maj. AMOS STICKNEY,

"*Chief U. S. Engineers, Louisville, Ky.*

"DEAR SIR: We respectfully request an extension until December 1st, 1888, of the time for completing work under our contract with the United States Government to enlarge the canal basin adjoining the Shippingsport locks of the Louisville and Portland Canal. Our reasons for this are that the high water from the Ohio River has upon two occasions since June 1st last prevented work and rendered the completion of it impracticable. We endeavored to stop the leaks from the canal wall, which flooded the space where we were working, but could not succeed in doing so. On account, also, of the limited space for dumping material as required by the contract, the force engaged upon the work was not so large as we should otherwise have employed; and this has concurred, with the flooding, to delay the completion of our undertaking.

"Trusting that these reasons will be deemed sufficient to warrant the extension asked, we remain,

"Very respectfully,

"GLEASON & GOSNELL."

Which letter was forwarded by Major Stickney to the Chief of Engineers with a recommendation that the same be granted, "with the provision that their work shall be so arranged as not to interfere with such other work as may be undertaken under the new appropriation, and that all extra cost to the United States by reason of the extension of time shall be charged against them and deducted from their payments," and the extension was granted accordingly by the Chief of Engineers.

64

XX.

The condition of the Ohio River during the season of 1888 was unusual and unprecedented for repeated and continued freshets and high water, in consequence of which the claimants were, during the period of the last extension of their contract, by freshets or force and violence of the elements and by no fault of their own, prevented from completing the work at the time agreed upon in the contract as extended.

XXI.

At or near the end of the year 1888 the claimants, through the personal solicitation of their attorneys, Bodley & Simrall, applied to the engineer in charge for an allowance of additional time for the completion of the work agreed upon in the contract, for the reason that they had, by reason of freshets and force and violence of the elements, and by no fault of their own, been prevented from completing the work at the time agreed upon in the contract as extended, whereupon the engineer in charge refused to allow such additional time.

The defendants nor the engineer officer in charge on their behalf did not annul or terminate the contract as therein provided for by reason of any delay or for any want of faithfulness or diligence on the part of the claimants in the prosecution of the work thereunder during the period of the last extension of said contract, but based his refusal to further extend the contract because, as he asserted, the claimants' had for a number of seasons failed to complete the work within the times agreed upon.

No judgment or decision was given by said engineer on the question as to whether the claimants were prevented by freshets and force and violence of the elements during the season of 1888 from completing the work agreed upon within the period limited by the last extension of the contract, nor did he find or decide that the claimants were not so prevented.

XXII.

The force of the United States engineer in charge of the work subsequent to 1888 did not complete the remaining work during the season of 1889.

XXIII.

The amount of reserved 10 per cent is $2,401, and has not been paid by the defendants to the claimants.

XXIV.

The amount of rock excavation covered by the contract was 13,000 cubic yds., of which the claimants excavated 3,575 cubic yds., leaving still to be excavated 9,425 cubic yds.

The cost to the claimants of completing the rock excavation, being slate, would have been 75 cents per cubic yd., and their net profit at the contract price would have been 30 cents per cubic yd., or $2,827.50.

65 XXV.

The claimants excavated 120,052 cubic yards of earth at no profit, their only profit being in the work on the rock excavation, as aforesaid. What it would have cost to complete the remainder of the earth excavation does not appear.

CONCLUSIONS OF LAW.

Upon the foregoing findings of fact the court decides as conclusions of law:

1. That in case No. 17782 the claimants are entitled to recover on Finding XI the retained percentage, amounting to $3,011.99, and on Finding XVI, as the net profits on the contract, $60,537.50.

2. That in case 17783 the claimants are entitled to recover on Finding XXIII the retained percentage, amounting to $2,401, and on Finding XXIV in said last-named case the further sum of $2,827.50.

3. In both cases the claimants are entitled to recover judgment on Findings XI, XVI, XXIII, and XXIV, in the aggregate, for the sum of sixty-eight thousand seven hundred and seventy-seven dollars and ninety-nine cents ($68,777.99).

VI.—*Opinion.*

PEELLE, J., delivered the opinion of the court:

These actions grow out of alleged breaches by the defendants of two separate contracts entered into by them with the claimants, the first of which, dated August 4, 1885, was for the excavation of 110,000 cubic yards, more or less, of rock excavation, "in the enlargement of the Louisville and Portland Canal," in Kentucky, the work thereunder to be completed on or before December 31, 1886.

The second contract, dated January 13, 1887, was for the excavation of 124,000 cubic yards, more or less, of earth and 13,000 cubic yards, more or less, of solid-rock excavation, "for enlarging the basin of the Louisville and Portland Canal at the head of the locks," which work was to be completed on or before December 31, 1887.

Both contracts were extended, the first twice and the second three times, the last extension of the first contract being to December 31, 1888, and the last of the second contract to December 1, 1888.

During the season of 1888, the period of the last extensions, the condition of the Ohio River "was unusual and unprecedented for repeated and continued freshets of high water," in consequence of which the working season in the Ohio River at Louisville, Ky., was limited to about thirty-five days, and by reason of which the claimants, without any fault on their part, were prevented from completing the work within the time agreed upon in the contracts as last extended.

At and after the expiration of the contracts so extended the claimants, through the personal solicitations of their attorneys, applied to the

engineer in charge for an allowance of additional time for the completion of the work agreed upon, for the reason that they had been, by freshets, high water, or other force of the elements, and by no fault of their own, prevented from completing the work within the time agreed upon, but the engineer officer in charge refused to allow any additional time,
66 basing his refusal on the claimants' failure to complete the work within the times agreed upon prior to the last extensions.

Before the first contract was entered into the engineer in charge prepared specifications for the information of bidders, which the claimants examined and on the faith of which they entered into the contract. These specifications provided, among other things, that their contract would provide "that additional time may be allowed to a contractor for beginning or completing his work in cases of delay from freshets, ice, or other force or violence of the elements, and by no fault of his or their own."

There was no such provision in the specifications exhibited for the information of bidders before the second contract was entered into, but both contracts contained the following provision:

"If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party or parties (or either of them) of the second part, and upon the giving of such notice all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States; and the party of the first part shall be thereupon authorized, if an immediate performance of the work or delivery of the material be in his opinion required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in section 3709 of the Revised Statutes of the United States; provided, however, that if any party or parties of the second part shall, by freshets, ice, or other force or violence of the elements, and by no fault of his or their own, be prevented either from commencing or completing the work or delivering the materials at the time agreed upon in this contract, such additional time may in writing be allowed him or them for such commencement or completion as, in the judgment of the party of the first part or his successor, shall be just and reasonable; but such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforceable precisely as if the new date for such commencement or completion had been the date originally herein agreed upon."

By reason of the proviso to the paragraph of the contract just quoted, the claimants contend that, notwithstanding the extensions theretofore granted, they were entitled, by reason of the delay caused by the freshets aforesaid, to an allowance of additional time within which to complete the work agreed upon in the contract last extended, and that the refusal of the engineer officer in charge to allow additional time was a breach of

the contracts on the part of the defendants, resulting in great damage to the claimants in the loss of profits which would have accrued to them had such additional time been allowed.

The defendants contend that, in the absence of fraud, actual or constructive, the decision of the engineer officer in charge in refusing an extension of time for the completion of the work under the contract is final and conclusive and can not be reviewed by this court.

As to whether the extensions or allowances of additional time prior to December, 1888, were or were not granted on sufficient grounds, we are not called upon to decide. Nor is it necessary for us to consider the question as to whether the defendants' officers had the right, except in the manner provided by Revised Statutes, section 3709, to impose new conditions as the basis of an extension, as appears to have been done in the case of the first contract.

67 Both parties treat the extensions as having been made on sufficient grounds, and once consummated, the contract provides that "such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforcible precisely as if the new date for such commencement or completion had been the date originally herein agreed upon."

So that, for the purpose of these cases, we have only to do with the contracts as last extended; and in this respect we will consider the several dates for the completion of the work in December, 1888, as though they were the dates originally agreed upon in the contracts.

Whatever delays or defaults on the part of the claimants may have occurred prior to the last extensions of the contracts were waived by the defendants when the extensions thereof were granted; no forfeitures were declared at the time, and by the several extensions were waived, and once waived, can not be revived. (Pigeon's Case, 27 C. Cls. R., 167, 175.) So that the delay or diligence of the claimants in respect of the prosecution of the work could only be looked to by the officer in charge during the period of the last extensions.

In support of their contention the defendants have cited and rely upon a line of cases wherein it has been held in substance that "in the absence of fraud or such gross error as would imply bad faith" the decision of the engineer officer in charge in respect of quality and quantity of materials furnished and work done, or in any other matter wherein the parties have so agreed in the contract, shall be final.

In the case of Kihlberg v. United States (97 U. S., 398) a contract was made for the transportation of stores and supplies between certain points, providing that the distance should be "ascertained and fixed by the chief quartermaster." The distance was ascertained and fixed, but the same was less than by air line or the customary route, and for that reason objected to by the contractors; but the court held in substance (there being no fraud or gross error or failure to exercise an honest judgment) that the distance so fixed was final and conclusive, as the parties to the contract had agreed thereto.

This case was followed by the case of Sweeny v. United States (109 U. S., 618). In the latter case the contract provided that payments should not be made until some officer designated by the Government

should certify that the wall constructed "was in all respects as contracted for." The officer so designated expressly refused to give such certificate on the ground that "neither the material nor the workmanship were such as the contract required." The court held that in the absence of fraud or gross error the certificate was a condition precedent to payment.

That case was followed by the Martinsburg, etc., Co. v. March (114 U. S., 549), wherein the contract provided that the company's engineer should in all cases determine questions relating to the execution thereof, both as to the quantity of the several kinds of material and the compensation earned by the contractor, and that the same should be final and conclusive, and so the court held. Other like cases in principle are, Chicago, etc., Railroad Company v. Price (138 U. S., 185); Kennedy v. United States (24 C. Cls. R., 139); Ogden v. United States (60 Fed. Rep., 725); Elliott v. Railroad Co. (74 Fed. Rep., 707, 711); Gilmore v. Courtney (158 Ills., 432, 437).

68 The decisions cited, and upon which the defendants rely, grew out of the construction of contracts wherein the parties thereto, in terms, agreed, in respect of the subject-matter thereof, that the decision of the officers therein named should be final and conclusive, or should determine the question involved, as in the cases respectively stated.

In the case at bar a provision in the contract provides:

"All materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the Government, and such as do not conform to the specifications set forth in this contract shall be rejected. The decision of the engineer officer in charge as to quality and quantity shall be final."

By that provision of the contracts the parties, in terms, agreed that the decision of the engineer officer in charge "as to quality and quantity shall be final," so that a contractor entering into such a contract could not, "in the absence of fraud or such gross error as would imply bad faith," be heard to complain of such decision, and in effect such are all the decisions cited.

But in respect of the provision of the contracts in the cases at bar, where no additional time whatever was allowed, we are clear that those decisions do not apply.

Had the engineer officer in charge exercised his judgment in the allowance of some additional time, though inadequate, a different question would be presented; but when he failed to exercise his judgment in this respect, by refusing to allow any additional time, he did so in the face of conditions disclosed by his own reports or those of his subordinates, set forth in Finding VII, which entitled the claimants, if the provision means anything, to additional time.

The engineer in charge was, by the first provision of the paragraph of the contract quoted, made the judge as to whether the claimants had faithfully and diligently prosecuted the work "in accordance with the specifications and requirements of the contract;" and if in his judgment they had not so prosecuted the work, the defendants were by the terms of the contract given the "power, with the sanction of the Chief of Engineers, to annul" the contract in the manner therein provided. To this the claimants had agreed, and the engineer's decision therein would have been final.

But if the claimants were, "by freshets, ice, or other force or violence of the elements," and by no fault of their own, prevented from completing the work at the time therein agreed upon, the judgment of the engineer officer in charge was to be exercised, not in the annulment of the contract therefor, but in the allowance of such additional time as in his judgment "shall be just and reasonable."

If one enters into a contract possible of performance and such performance be prevented by the act of God, it is well settled that no breach can be assigned therefor, although no reference be made thereto in the contract. (McDermott v. Jones, 2 Wall., 1, 7; Satterlee, administrator, etc., v. The United States, 30 C. Cls. R., 31, 50, and authorities there cited; Cobb v. Harman, 23 N. Y., 150.)

In the cases at bar, however, the contracts in terms provide that "additional time may in writing be allowed" for the completion of the work if prevented therefrom "by freshets, ice, or other force or violence of
69 the elements" and by no fault of their own; not that such additional time may or may not be allowed as the engineer in charge may determine, but that "such additional time may in writing be allowed" as in his judgment "shall be just and reasonable."

The language taken together leaves no discretion in the officer except in respect of the additional time to be allowed, and even that, the contract provides, "shall be just and reasonable."

The claimants in effect agreed that no additional time should be allowed them except on condition that they were prevented from the completion of the work (1) "by freshets, ice, or other force or violence of the elements," and (2) by no fault of their own; and to hold, when those conditions are present, that it is within the discretion of the engineer in charge to say whether any or no additional time may be allowed would be to eliminate that mutuality essential in conscionable contracts.

Hence, taking into consideration the circumstances of this case, and to effectuate the intention of the parties gathered from the contracts as a whole, we must hold that the word "may" should be construed to mean "shall."

As to what additional time would be just and reasonable he, as the engineer officer in charge, was to determine, not by the exercise of arbitrary power, but by the exercise of a just and reasonable judgment; and any aditional time thus allowed would have been final.

To this the parties to the contract had agreed, and the claimants were therefore entitled to have the engineer officer exercise his judgment in this respect. (Crane Elevator Co. v. Clark, 80 Fed. Rep., 705, 708.)

True, as the officer and agent of the defendants, he was bound, as between himself and his principal, to fairness and good faith (Hume v. United States, 132 U. S., 406), but that did not deprive him of the right, but rather enjoined upon him the duty under the contract, of dealing justly and fairly with the claimants, as by the terms of the contracts whatever additional time he allowed was to be equally binding on the defendants; and in this respect the officer was the arbitrator to whom the question was referred by the parties to the contracts, and by whose decision, in the absence of fraud, they mutually agreed to be bound (Gordon v. United States, 7 Wall., 188, 194); but he was not made an arbitrator to annul or terminate the contracts on the grounds made the

basis for an allowance of additional time; nor on the ground of delinquencies in previous years, as the extended contracts were, in respect of their several dates, new contracts, the performance or nonperformance of which did not depend upon anything done or omitted to be done thereunder prior to the last extensions.

Notwithstanding this, the engineer in charge annulled the contracts on the grounds of delinquencies in previous years, as before stated. The claimants had made no agreement to this effect, and it is only by the mutual assent of the parties that a contract can be modified or annulled. (Utley v. Donaldson, 94 U. S., 29; Wheeler v. New Brunswick Co., 115 U. S., 29.)

The engineer officer having himself or through his subordinates reported from month to month during the period of the last extension of the contracts, as set forth in the findings, that the claimants had, by reason of freshets and high water, been prevented from completing the work at the time therein agreed upon, thereby conceded that the condition or events provided against in the contracts and made the grounds or basis for an allowance of additional time had occurred, and in the absence of fraud or gross error, not contended in these cases, was binding on the defendants and not open to dispute.

In the construction of contracts courts consider not only the language employed, but the subject-matter and the surrounding circumstances, and thereby avail themselves of the light which the parties possessed when the contract was entered into. Merriam v. United States (107 U. S., 437); United States v. Gibbons (109 U. S., 200); Mobile & M. R. Co. v. Jurey (111 U. S., 584).

And courts apply the same rules of construction to contracts made by the United States as to those between individuals (United States v. Smoot, 15 Wall., 36), and they are liable in damages for a breach of their contract on the same principles and to the same extent as a private party. (Chicago R. R. Co. v. United States, 104 U. S., 680, 685; United States v. Smith, 94 U. S., 214.)

In thus viewing the contracts we find that the excavation to be done thereunder was of earth and rock in the bed of the Ohio River exposed to great force of the river in times of freshets and high water, the performance of which work necessitated the expenditure of large sums of money both in the preparation for and in the prosecution of the work, and it was doubtless because of these foreseen probable difficulties that provision was made in the contracts for additional time in case the claimants should, "by freshets, ice, or other force or violence of the elements," be prevented either from commencing or completing the work at the time therein agreed upon.

This, it seems to us, was the manifest intention of the parties by the words used, and to give effect thereto is the controlling consideration in the construction of contracts. (Canal Co. v. Hill, 15 Wall., 94, 103.)

The whole contract is to be considered, the purpose of it, the subject-matter, and the surrounding circumstances, and each part so construed with the others that all may be given effect, if possible.

Thus viewing the contract and the specifications made part thereof, we are of the opinion that the refusal of the engineer officer in charge to allow such additional time as, in his judgment, was "just and reasonable"

constituted a breach of the contracts on the part of the defendants, resulting, as the claimants contend, in the loss of profits which they would have realized as the fruits thereof had they been permitted to complete the work thereunder.

This brings us to the question as to whether the damages thus sustained are recoverable—i. e., are they the natural and proximate consequence of the breach?

On this point we think there can be no controversy, for by the annulment of the contract the claimants were compelled to cease the work of excavation thereunder; and while this of itself resulted, as the findings show, to their benefit in preventing them loss on the work of excavation, it also resulted in depriving them of the material which, by the terms of the contract and as part of the consideration therefor, became their property when excavated.

71 "If the outlay equals or exceeds the amount to be received, of course there can be no profits." (United States v. Behan, 110 U. S., 338, 345.) But if the amount to be received exceeds the outlay, then the difference, making reasonable deductions within the rule next stated, will be the amount of profits recoverable.

The ordinary rule for the measure of damages in such cases is "the difference between the cost of doing the work and what the claimants were to receive for it, making reasonable deductions for the less time engaged and for release from the care, trouble, risk, and responsibility attending a full execution of the contract." (United States v. Speed, 8 Wall., 77, 84; Masterson v. Mayor of Brooklyn, 7 Hill, 69.)

The latter, the court in the preceding case says, is the leading one on the subject.

In the case of United States v. Behan (110 U. S., 338, 344), where a contract was made for the improvement in the harbor at New Orleans, and the contractor was, without any fault on his part, prevented from performing the contract, the court stated the rule for the measure of damages thus:

"The prima facie measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage, namely: First, what he has already expended toward performance (less the value of materials on hand); secondly, the profits that he would realize by performing the whole contract. The second item, profits, can not always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires. But when, in the language of Chief Justice Nelson, in the case of Masterson v. Mayor of Brooklyn (7 Hill, 69), they are 'the direct and immediate fruits of the contract,' they are free from this objection; they are then 'part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation.' * * *

"When a party injured by the stoppage of a contract elects to rescind it, then, it is true, he can not recover any damages for a breach of the

contract, either for outlay or for loss of profits; he recovers the value of his services actually performed as upon a quantum meruit. There is then no question of losses or profits. But when he elects to go for damages for the breach of the contract, the first and most obvious damage to be shown is the amount which he has been induced to expend on the faith of the contract, including a fair allowance for his own time and services. If he chooses to go further, and claims for the loss of anticipated profits, he may do so, subject to the rules of law as to the character of profits which may be thus claimed."

Under the contract in the first case at bar, however, there is an element of damage which arises under the second specification, made part of the contract, and set out in Finding XIV, which reads:

"All material excavated under this contract will be the property of the contractor, and must be disposed of in such a manner as not to interfere with navigation, of which the engineer in charge shall be the judge. The contractor is forbidden to deposit any excavated material on canal property without permission."

Under that provision the claimants contend that they are entitled (1) to the increase in the cubic contents of the rock by crushing and (2) to the reasonable profit thereon at the place of delivery.

In legal effect the material excavated became a part of the consideration therefor, and the claimants being prevented from the completion of the work without any fault on their part thereby suffered the loss of the profits they would have made on such excavated material had they been permitted to complete the work under the contract as last extended.

72 That such loss resulted from the natural and proximate consequence of the breach we think there can be no question, and the claimants are therefore entitled to recover damages therefor, measured by the rules stated.

The cubic contents of the excavated material, the findings show, would have increased by crushing one-half, i. e., 1 cubic yard of material as excavated would make by crushing 1½ cubic yards of broken stone; and that when so crushed was a valuable commodity for which there was a ready market in Louisville, Ky., at $1.25 per cubic yard.

The cost of crushing the excavated material and delivering the same in the market at Louisville would have been 50 cents per cubic yard of the crushed material, leaving as the claimants' net profit thereon 75 cents per cubic yard.

The specifications providing that "all material excavated under this contract will be the property of the contractor" no doubt influenced the claimants in making the bid of 85 cents per cubic yard for such excavation, as otherwise they would have lost on the contract, as the findings show, 40 cents per cubic yard, or $33,400.

The claimants having made their bid and entered into the contract on the faith of the specifications, we think they are entitled to recover the profits which would have accrued to them on the excavated and crushed material had they been permitted to complete the work, less the amount they would have lost on the work of excavation, leaving as their net profit thereon the sum of $60,537.50.

Under the second contract the claimants' bid for rock excavation was $1.05 per cubic yard, and the rock to be excavated was slate, or of a

slaty character, and could, as the findings show, have been excavated for 75 cents per cubic yard.

As to the amount of $2,827.50, in Finding XXIV, being the difference between the cost of completing the excavation and what the claimants were to receive therefor under their contract in case No. 17783, we think that comes clearly within the authorities cited, and the same is allowed.

As to the retained percentage in both cases, amounting to $5,412.99, as set forth in Findings XI and XXIII, the defendants concede that under the decisions in the cases of Van Buren v. Diggs (11 How., 461, 477); Pidgeon v. United States (27 C. Cls. R., 167); Satterlee v. United States (30 C. Cls. R., 31, 50), and Kennedy v. United States (24 C. Cls. R., 122) the claimants are entitled to recover.

In the latter case the court said: "The 10 per cent reserved until the completion of the work, though declared forfeited by the agreement in case of its annulment, must be treated as a penalty and not as liquidated damages."

That case was ruled by the decision in the case of Van Buren v. Diggs (supra), in which the court said: "The clause of the contract providing for the forfeiture of 10 per centum of the amount of the contract price upon a failure to complete the work by a given day can not be properly regarded as an agreement or settlement of liquidated damages. The term forfeiture imports a penalty; it has no necessary or natural connection with the measure or degree of injury which may result from a breach of contract or from an imperfect performance. It applies an absolute infliction, regardless of the nature or extent of the causes by which it is superinduced."

"Unless, therefore, it shall have been expressly adopted and declared by the parties to be a measure of injury or compensation, it is never taken as such by courts of justice, who leave it to be enforced, where this can be done, in its real character, viz, that of penalty."

As there was no such agreements or declarations by the parties in either contract, the 10 per centum retained must be treated as a penalty; and as the defendants are not claiming damages for the claimants' failure to complete the work under the contract, there can be no retention by way of recoupment, and hence they are entitled to recover therefor.

The total amount recoverable in both cases, as stated in the last conclusion of law, is $68,777.99, for which judgment will be entered.

73 VII. *Judgment of the court.*

JOHN R. GLEASON AND GEORGE W. GOSNELL
vs.
THE UNITED STATES. } Nos. 17782 and 17783, consolidated.

At a Court of Claims held in the city of Washington on the 6th day December, A. D. 1897, judgment was ordered to be entered as follows:

The court on due consideration of the premises find for the claimants and do order, adjudge, and decree that the claimants, John R. Gleason and George W. Gosnell do have and recover of and from the United States the sum of sixty-eight thousand seven hundred and seventy-seven dollars and ninety-nine cents ($68,777.99).

BY THE COURT.

74 VIII. *Defendants' motion for new trial, filed Feb. 8, 1898.*

Come now the defendants, by their Attorney-General, and, under and pursuant to the provisions of section 1088 of the Revised Statute of the United States, allege that wrong and injustice has been done the United States in the judgment heretofore rendered against them in the above-entitled cause, in this, to wit, that the court found a fact that:

"The defendants, nor the engineer officer in charge on their behalf, did not annul or terminate the contract as therein provided for by reason of any delay or for any want of faithfulness or diligence on the part of the claimant in the prosecution of the work thereunder during the period of the last extension of said contract, but based his refusal to extend the contract on the claimants' failure to complete the work within the times agreed upon prior to the last extension."

Whereas in truth and in fact the said claimants did not perform nor prepare to perform the covenants, promises, and agreements made in their letter of December 31, 1897 (set out in Finding IV), nor were they prevented from so doing by freshets, ice, or violence of the elements or by causes beyond their control; and because they did not so perform, nor prepare to perform, and because they were not so prevented from performing, the defendants' engineer, among other reasons, exercised the discretion vested in him by the contract and declined to grant a further extension of time. These facts are established by the evidence already adduced and are conclusively shown in the affidavit of Amos Stickney procured since the rendition of said judgment, which said affidavit is as follows:

75 STATE OF MISSOURI, *City of St. Louis, ss:*

On this 5th day of January, 1898, personally appeared before me, a notary public, for and within the City of St. Louis and State aforesaid, Lieut. Col. Amos Stickney, corps of engineers, U. S. Army, who, being duly sworn, upon his oath says:

That his refusal to grant further extension of time for the completion of two contracts between the United States and Gleason and Gosnell for work of excavation connected with the Louisville and Portland Canal at Louisville, Ky., in the latter part of 1888, was based upon:

1st. The failure of said Gleason and Gosnell to either finish their work at the time called for by the last extension of said contracts, or to make proper provisions for carrying on the work.

2d. The said contractors did not fulfill the conditions upon which their time had already been extended.

3d. That the leniency already shown said contractors in extending one of the contracts twice and the other three times, had not brought forth such efforts on the part of the contractors as the circumstances required.

4th. That previous performances held out no hope of better efforts on their part.

5th. That the faults of the said contractors deprived them of the right to demand further extensions.

And he further states that he exercised his judgment in the fullest degree upon the contractual stipulation relating to extension of time, taking into consideration all of the facts of the case.

(Signed) AMOS STICKNEY,
Lieut. Col. of Eng'rs, U. S. A.

Sworn to before me and subscribed in my presence this 5th day of January, 1898.

GEORGE H. MILBURN,
Notary Public.

Wherefore, and in consideration of the premises and for the reasons set forth in defendant's motion for reformation of the findings of fact, this day filed, great wrong and injustice has been done the United States
76 and they ask that the judgment heretofore rendered against them in the above-entitled cause be set aside and that a new trial be granted to them.

L. A. PRADT,
Assistant Attorney-General,
By GEORGE H. GORMAN,
Special Attorney in Charge of Case.

APRIL 4, 1898.

Overruled.

C. C. NOTT, *Chief Justice.*

77 IX.—*Defendant's motion for reformation of findings of fact.—Filed February 8, 1898.*

Come now the defendants, by their Attorney-General, and move the court to amend and reform the findings of fact in the above-entitled cause in the following particulars, to wit, Findings V and XXI.

These findings should be entirely omitted. It is not a finding of fact at all, but a conclusion of law, merely. As it stands, the Supreme Court is told that this provision of the contract was, in fact, incorporated into all the agreements for extension of time. It has never been pretended by anyone that this was true, as a fact. If such provisions continued it could only be by operation of law. This is one of the principal contentions in the case, on the construction of the contract. It is improper to find it as a fact. (Burr & Des Moines, 1 Wall., 99–102; McClure v. U. S., 116 U. S., 145, 151.)

Finding IX.

This finding should be amended to read as follows:

The season of 1888 was an unfavorable one for the prosecution of this work, and the freshets of that year materially assisted in preventing the claimants from completing the work, but if they had provided themselves with suitable dams, and if they had performed the promises set out in the letter embraced in Finding IV, they could have worked at much higher stages of water and could have excavated considerable
78 more material. They did not perform the promises made in the aforesaid letter, either in the number of men to be employed, or in the capacity of the plant to be used; and their failure to do this was one of the reasons assigned by Col. Stickney for refusing to grant them additional time at the close of the season of 1888.

(See Record, pp. 217, q. 28, 29; 220, q. 52; 237, q. 38, et seq; 238, q. 44; 241, q. 75–77; 290, 291, 292. See affidavit of Stickney filed this day with motion for new trial. These facts are fully established.)

Finding VI.

Add to this finding, at the end thereof, the words:

The contractor relied upon this cross dam and upon the canal guiding dyke, and in the lower work upon the canal wall, for the purpose of keeping water out of the area to be excavated. These structures had been built for a great many years prior to the letting of this work, were constructed for entirely different purposes, to wit, to hold the water up in the canal at low stages, and they were entirely unsuitable for the purposes for which the contractors used them. Had the claimant, instead of relying upon these unsuitable structures (which they did voluntarily and without any inducements from defendants), provided himself with suitable and sufficient dams, he could have worked at very much higher stages of water, both in the year 1888 and previously.

(There can be no doubt about the truth of this statement. It is a fact, and a very important fact, and it should be so found. It was the principal cause of their failure to complete the work within the
79 required time. See Record, pp. 326, 327; 214, 215, q. 8 to 20. See Skelsey vs. U. S., 23 Ct. Cls., 61, 67. See Record, p. 241, q. 75 to 77.)

Finding XI and XXIII.

Omit the second paragraph in each finding and insert in lieu thereof the following:

In refusing to further extend the time for the completion of these works, the engineer in charge gave the following reasons:

1st. The failure of said contractors to either finish their work at the time called for by the last extension of said contracts or to make proper provisions for carrying on the work.

2nd. The said contractors did not fulfill the conditions upon which their time had already been extended.

3rd. That the leniency already shown said contractors in extending one of the contracts twice and the other three times had not brought forth such efforts on the part of the contractors as the circumstances required.

4th. That previous performances held out no hope of better efforts on their part.

5th. That the faults of the said contractors deprived them of the right to demand further extensions.

Finding XXII.

Omit this finding and insert in lieu thereof the following:

While the season of 1888 was unusually unfavorable for this character of work, and while such unfavorable weather retarded the work, it was not the sole cause of the failure of the contractors to complete the work during that season. One of the principal causes of their failure to complete said work was caused by a leak which occurred in the canal wall adjacent to the area to be excavated which constantly flooded said area
with water, the claimants being unable to stop said leak, but
80 which the Government officers stopped quickly and inexpensively after they took charge of said work upon the annulment of claimants' contract. In relying upon said canal wall to protect their work from flooding, the claimants exercised their own judgment, uninfluenced by any permission, promises, or representations from the defendants. The canal wall, built many years before the undertaking of this work, was a dry wall and wholly unsuited to purposes for which claimants relied upon it.

If, instead of relying upon said canal wall, as aforesaid, the claimants had provided themselves with proper dams for the exclusion of water from the site, they could have worked a much longer time during each season, including the season of 1888, than they did work, and could have excavated much a greater quantity of material than they did excavate.

(See Record, pps. 340, q. 9 to 21; 344 and 348, passim; 326 and 327, passim. See Defendants' Ex. No. 2, in case No. 17783, where these facts are abundantly established.)

L. A. PRADT,
Assistant Attorney-General,
By GEORGE H. GORMAN,
Special Attorney in Charge of Case.

APRIL 4, 1898. Allowed in part and overruled in part. See order filed this day, April 4, 1898.

BY THE COURT.

81 X.—*Order overruling motion for new trial and to amend findings of fact.*

At a Court of Claims held in the city of Washington on the 4th day of April, A. D. 1898, the motion of the defendants for a new trial in the above-entitled cause was overruled, and an order was filed amending certain of the findings of fact herein under the defendants' motion, and it was ordered that the findings heretofore filed be withdrawn and the amended findings filed in lieu thereof as of December 6, 1897.

BY THE COURT.

82 XI.—*Appeal by defendants from the judgment entered December 6, 1897, and allowance of same.*

From the judgment rendered in the above-entitled cause on the 6th day of December, 1897, in favor of the claimants, the defendants, by their Attorney-General, on the 5th day of April, 1898, make application for, and give notice of, an appeal to the Supreme Court of the United States.

LOUIS A. PRADT,
Assistant Attorney-General,
By GEORGE H. GORMAN,
Special Attorney.

Filed April 5, 1898.

At a Court of Claims held in the city of Washington on the 5th day of April, A. D. 1898, Mr. Assistant Attorney-General Pradt presented the above application for the allowance of appeal, filed as of this date, and it was allowed as prayed for.

BY THE COURT.

APRIL 5, 1898.

83 XII.—*Appeal by defendants from the order overruling motion for new trial entered April 4, 1898, and allowance of same.*

From the judgment overruling the defendants' motion for new trial rendered in the above-entitled cause on the 4th day of April, 1898, in favor of the claimant, the defendants, by their Attorney-General, on the 5th day of April, 1898, make application for, and give notice of, an appeal to the Supreme Court of the United States.

LOUIS A. PRADT,
Assistant Attorney-General,
By GEORGE H. GORMAN,
Special Attorney.

Filed April 5, 1898.

At a Court of Claims held in the city of Washington on the 5th day of April, A. D. 1898, Mr. Assistant Attorney-General Pradt presented the above application for allowance of appeal filed as of this date, and it was allowed as prayed for.

BY THE COURT.

APRIL 5, 1898.

84 In the Court of Claims.

JOHN R. GLEASON AND GEORGE W. GOSNELL
vs.
THE UNITED STATES. } No. 17782 and 17783, consolidated.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusions of law thereon, of the opinion of the court, of the judgment of the court, of the motion of the defendants for a new trial and the order of the court overruling said motion, of the applications of the defendants for and the allowance of appeal to the Supreme Court of the United States.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Washington this 13th day of April, A. D. 1898.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) Case No. 16851. Court of Claims. Term No., 280. The United States, appellant, vs. John R. Gleason and George W. Gosnell. Filed April 18, 1898.